N.Y. Supp. 745, 162 Misc. (N.Y.) 491 (1937). Where those patrons who did pay to attend the theatre on the day of the drawing, as well as those who did not attend, had a chance to win the award, the admission price paid by some of the potential winners is held to be sufficient consideration to brand the plan as a lottery. *Jorman* v. *State*, 54 Ga. A. 738, 188 S.E. 925 (1936); *City of Wink* v. *Griffith Amusement Co.*, 100 S.W. (2d) 695 (1936); *Commonwealth* v. *Wall*, 3 N.E. (2d) 28 (1936); *Central States Theatre Corp.* v. *Colonial Theatrical Enterprises*, 276 Mich. 127, 267 N.W. 602 (1936).

Thus, to outlaw a device, scheme, or game under the gaming statutes, it is necessary to find the element of chance thwarting the element of skill involved, or the chance appearing in the amount of the prize the player way win. The game must be played for money or other valuable thing, which may include property, or merely amusement or entertainment, in addition to the goods which the patron professes to buy. To hold a scheme illegal as a lottery it is necessary to find the elements of chance, prize, and consideration. The consideration need not be a pecuniary one flowing from the patron directly to the operator of the lottery, but may be found to be any benefit to the operator, though it comes to him from some other source, and not directly from the patron.

ARTHUR W. MEIFERT

EVIDENCE

ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE — WIRE TAPPING

The defendants were charged with smuggling alcohol, possessing and concealing smuggled alcohol, and conspiracy to smuggle and conceal alcohol. Much of the evidence was secured by the wire tapping activities of Federal agents. The defendants were convicted and the result affirmed by the Circuit Court of Appeals. *U. S.* v. *Nardone*, 90 Fed. (2d) 630; certiorari granted, 58 S. Ct. 27, 82 L. Ed. Adv. Op. 11 (1937). Section 605 of the Federal Communications Act of 1934, 47 U.S.C.A. Sec. 605, 48 Stat. 1103 (June 19, 1934), provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communication to any person." On the basis of this section the United States Supreme Court reversed the judgment of conviction, Justices Sutherland and McRey-

nolds dissenting. *Nardone* v. *U. S.*,—U.S.—, 82 L. Ed. 250, 58 S. Ct. 275 (1937).

The majority held in *Nardone* v. *U. S., supra,* that the word "person" included agents of the Federal Government. The dissent argued that such a construction was not necessary and should not be adopted, since it would be such an aid to criminals and a handicap to the government. Nothing was said about such evidence being a violation of the Fourth Amendment. But in the absence of a violation of the Fourth Amendment of the Federal Constitution or a similar amendment of a state constitution, "the common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained." See opinion of Mr. Chief Justice Taft in *Olmstead* v. *U. S.*, 277 U. S. 438, at 467, 72 L. Ed. 944, 48 S. Ct. 564, 66 A.L.R. 376 (1928). See also: 4 Wigmore, Evidence, Sec. 2183; 13 Minn. L.R. 1, 58 (1928); 53 A.L.R. 1485, 66 A.L.R. 397. As observed by Jones in his "Commentaries on Evidence," Vol. 5, Sec. 2075, note 3, "Where there is no violation of a constitutional guarantee, the verity of the above quotation is absolute."

Under the Federal rule evidence obtained in violation of the Fourth Amendment is not admissible. At least half the states, following the lead of New York in *People* v. *Defore,* 242 N. Y. 13, 150 N.E. 585; certiorari denied 270 U. S. 657, 46 S. Ct. 353, 70 L. Ed. 784 (1926), and Massachusetts in *Commonwealth* v. *Wilkins,* 243 Mass. 356, 138 N.E. 11 (1923), admit the evidence on the ground that a violation of law by an officer is no reason why a guilty criminal should escape. 4 Wigmore, Evidence, Sec. 2183; *State* v. *Reynolds,* 101 Conn. 224, 125 Atl. 636 (1924); *Hall* v. *Commonwealth,* 138 Va. 727, 121 S.E. 154 (1924); see also: 20 Ky. L.J. 354 (negative view), 358 (positive view) (1932), 24 Ky. L.J. 191 (1936), 23 Va. L. Rev. 84 (1936). Ohio has recently adopted this view in *State* v. *Lindway,* 131 Ohio St. 166, 2 N.E. (2d) 255, 5 Ohio Op. 538 (1936). The two rules are discussed in detail in 3 O.S.L.J. 73.

In 1928, the Supreme Court was confronted with the specific question whether the use of evidence of private telephone conservations between the defendants and others, intercepted by Federal prohibition officers tapping telephone wires off the premises, amounted to a violation of the Fourth Amendment. *Olmstead* v. *U. S., supra.* Mr. Chief Justice Taft, speaking for the court with Justices Van Devanter, McReynolds, Sutherland, and Sanford concurring, asserted that the language of the Amendment could not be broadened to protect telephone wires reaching from the defendant's house to the whole world; and that this

situation did not come within the rule followed in *Gouled* v. *U. S.*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921), since there was no actual entrance into the private quarters of defendant nor taking away of something tangible. He observed that the *Gouled* case, *supra*, carried the inhibition against unreasonable searches and seizures to the extreme limit. The court followed the common law rule that the unethical manner of obtaining the evidence did not make it inadmissible and declared that a standard which would forbid the reception of such evidence would make society suffer and give criminals greater immunity than had been known heretofore. The court decided that the Washington statute, Remington Compiled Statutes, 1922, Sec. 2656-18, or Remington's Revised Statutes of Washington, Vol. 4, Sec. 2656-18 (1932), making interception of telephone messages a misdemeanor did not affect rules of evidence in Federal criminal trials but that congress might protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in such trials, by direct legislation. Mr. Justice Holmes in the *Olmstead* case, *supra*, called the conduct of the Prohibition officers "dirty business," and said that less evil would result from a few criminals going unpunished, than from permitting the government to play an ignoble part by paying for other crimes in law enforcement. In a vigorous dissent, Mr. Justice Brandeis declared that present-day inventions and the inevitable progress of science in the immediate future necessitated a broader interpretation of the language of the Fourth and Fifth Amendments to include the scientific means by which the government may invade a man's home and private life. Mr. Justice Butler was of the opinion that a broad view should be taken of constitutional safeguards when personal rights were concerned. Mr. Justice Stone concurred in most of the other dissenting opinions.

On the basis of the United States Supreme Court decision in the *Olmstead* case, *supra*, the lower Federal courts admitted evidence obtained by wire tapping in all cases presented. *Kerns* v. *U. S.*, 50 Fed. (2d) 602 (1931); *Morton* v. *U. S.*, 60 Fed. (2d) 696; certiorari denied, 288 U. S. 607, 77 L. Ed. 982, 53 S. Ct. 401 (1932); *Foley* v. *U. S.*, 64 Fed. (2d) 1; certiorari denied, 289 U.S. 762, 77 L. Ed. 1505, 53 S. Ct. 796 (1933); *Bushouse* v. *U. S.*, 67 Fed. (2d) 843 (1933); *Beard* v. *U. S.*, 82 Fed. (2d) 837 (1936); *U. S.* v. *Nardone*, 90 Fed. (2d) 630 (1937); *Smith* v. *U. S.*, 91 Fed. (2d) 556 (1937). Several bills were introduced and a congressional investigation of the wire tapping activities of Federal officers was conducted during this period, but no acts were passed relative to the admissibility of such evidence. The

appropriation for the Bureau of Prohibition in the Department of Justice for the fiscal year ending June 30, 1934, 47 Stat. 1381 (Mar. 1, 1933), contained a provision that no part of the appropriation could be used to sponsor wire tapping in securing evidence of violations of the National Prohibition Act. In 1934, Congress enacted the Federal Communications Act, *supra*, (the relevant part of Sec. 605 is set out above). This section is almost identical with Sec. 27 of the Radio Act of 1927, 44 Stat. at L., Pt. II Pub. Laws, 1172, except that control over wire messages is also given to the new commission. The United States Court of Appeals for the District of Columbia did not mention the Communications Act in admitting evidence secured by wire tapping in the case of *Beard* v. *U. S.*, *supra*, and in *Smith* v. *U. S.*, *supra*, it held that Sec. 605 did not render such evidence inadmissible. The Circuit Court of Appeals, Second Circuit, in *U. S.* v. *Nardone*, *supra*, followed this view with the comment that since Congress had not seen fit to adopt the suggestion of the *Olmstead* case, *supra*, by making evidence obtained by wire tapping inadmissible in evidence by direct legislation, it was bound to enforce the law of that case.

However, Mr. Justice Roberts, giving the opinion of the Supreme Court in the principal case, found in Section 605 of the Communications Act the plain mandate of Congress that the secrecy of telephone messages should be protected. "Person" as used in the section was interpreted to include federal agents, and the ban on communication "to any person" prohibited testimony in court. The statement in the majority opinion that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty," *Nardone* v. *U. S.*, *supra*, seems reminiscent of Mr. Justice Holmes' dissenting opinion in the *Olmstead* case, *supra*.

In a dissenting opinion, concurred in by Mr. Justice McReynolds, Mr. Justice Sutherland argued that in view of the failure of Congress to pass all bills directly on the subject, if Congress had intended to shackle the hands of federal officers it would have done so in a more definite manner than by using the word "person". He contended that the vast difference between interception by curious inter-meddlers and by government officers acting under orders from the Attorney General warranted the exclusion of federal officers from the prohibition of Section 605. The policy argument of this opinion is in accord with the majority opinion of Mr. Justice Taft in the *Olmstead* case. Mr. Justice Sutherland pointed out that several bills had been introduced expressly prohibiting federal agents from tapping wires, and that none of them were passed.

It will be noted that of the five justices who voted for conviction in the *Olmstead* case, three were no longer members of the Supreme Court when the *Nardone* case was decided; and that the other two voted for conviction in the latter case. Only one of the four dissenting justices in the former case is no longer a member, and the remaining justices voted against conviction in the principal case. The justices who have since been appointed also voted against conviction in the principal case. The court now seems definitely committed to the proposition that evidence secured by the wire tapping of Federal agents is inadmissible in the Federal courts, but the policy of the doctrine seems questionable.

WILLIS R. DEMING

FIXTURES

PRIORITY OF LIEN—CONDITIONAL SALE CONTRACT OR CHATTEL MORTGAGE OVER REAL ESTATE MORTGAGE

The vendor installed two hot-air furnaces in a dwelling house, under a conditional sale contract, filed July 16, 1932, in which it was agreed that the furnaces should remain personal property, and removed two furnaces then upon the premises. The furnaces were held in place by their own weight and attached to pipes and ducts already on the premises. At the time of the installation the realty was mortgaged to the Central United National Bank of Cleveland, which mortgage the Home Owners' Loan Corporation paid on or about January 7, 1934, and took a first mortgage of the realty without actual notice of the conditional sale. In an action between the assignee of the contract and the Home Owners' Loan Corporation, the Court of Appeals held that the furnaces were a part of the realty, and that the mortgagee of the realty had a superior right to the furnaces. *Twentieth Century Heating & Ventilating Co.* v. *Home Owners' Loan Corporation*, 56 Ohio App. 188, 10 N.E. (2d) 229, 24 Ohio L. Abs. 56, 8 Ohio Ops. 237 (1937).

In order to determine the rights of a conditional vendor or chattel mortgagee and a mortgagee of the land it must first be ascertained whether the property covered by the agreement has lost its character as personalty and become a part of the realty. That, for so much as remains personal property, the vendor or chattel mortgagee has priority over the real estate mortgagee. See: *Chase Manufacturing Co.* v. *Garven*, 45 Ohio St. 289, 13 N.E. 493, 90 D.R. 501 (1887); *Keeler* v.