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Legislative or Judicial Control of Attorneys.

LEGISLATION

LEGISLATIVE OR JUDICIAL CONTROL OF ATTORNEYS.—One of the provisions of the recently proposed New York Constitution which affects the lawyer as well as the law student is Art. VI, Sec. 8: "The Court of Appeals shall have the power to make and enforce rules and regulations for the admission of attorneys and counselors at law and for their control, regulation and discipline." If this article had been adopted at the recent elections, there would be no question but that the Court of Appeals would have this power. Its rejection,[1] however, brings to the fore again, but does not settle, an absorbing controversy. On the one hand, certain members of the legal profession who thought that this section was merely declaratory of the previous authority of the court in this regard, feel that the power of the judiciary has not been prejudiced by the result. On the other hand, many lawyers who argued that such a provision stripped the legislature of an absolute right it enjoyed believe that a revolutionary change has been avoided and the authority of the legislature is still paramount.

It is the purpose of this article to show that were the question again presented for review the Court of Appeals might well find that the courts rather than the legislature already had, and hence continue to have, this power without the need of any constitutional amendment ratified by the people.

In the early days of the English common law, the forerunners of the modern lawyer were generally divided into two groups called attorneys and advocates.[2] At first the king alone had the privilege of appointing an individual, one "attorned",[3] to stand in his stead to carry on his litigation but later, by royal writ, he conceded this privilege to others who were thus able to appoint a "responsalis"—later known as an "attorney".[4]

The advocate, on the other hand, originally as a favor, later for pay, recited the phraseology prescribed by the captious formalism of the early common law, when: "the word was the sovereign talisman and every slip was fatal".[5] Thus the litigant was given a second chance since he could disavow the mispoken word of his advocate when he could not retract his own.[6]

In 1275 Edward I was forced to regulate the legal fraternity[7] and, in

1. Since this provision was only part of the general Judiciary Article which contained many highly controversial issues, both political and judicial, including the creation of a new judicial district in Suffolk and Nassau Counties, its defeat cannot be attributed to the lack of merit in the stated section but rather to the dissatisfaction of the electorate with the remaining sections of the article.

2. Lord Brougham in the Sergeant's case said: "If you appear by attorney he represents you but when you have the assistance of an advocate, you are present and he represents your cause by learning, ingenuity and zeal." MANNING, SERVIENS AD LEGEM, 435-492.

3. Such an appointee was analogous to the agent of today. 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1926) 211.

4. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 211.

5. Wood v. Lucy, Lady Duff Gordon, 222 N. Y. 88, 48 N. E. 214 (1917), per Cardozo, Ch. J.

6. POLLOCK & MAITLAND, *op. cit. supra* note 3, at 211.

7. In the Statute of Westminister I, c. 29, he threatened with imprisonment "the serjeant countor" who was guilty of colusive or deceitful practice.

1292, he delegated to his justices the power to appoint attorneys.[8] By the days of Henry IV, attorneys became so numerous and of such varying abilities that the king ordered his justices to examine all attorneys and put only those upon the roll who were of good character and sufficient learning.[9]

During these years, the lawyers and students began to meet and then came to settle in customary societies called Inns[10] and the attorney instead of being the agent of the litigant was becoming an officer of one or another of the chief courts such as Common Pleas or King's Bench, subject to its regulations and orders.[11] Thus by the 16th century, there were a considerable body of individuals who were either called barristers or attorneys, the former devoted more to the substantive, the latter more to the adjective branch of the law, though the distinction between the two was not so distinctive as heretofore.[12] At the head of the barristers were the judges and sergeants-at-law chosen from the members of the four Inns of Court, called Benchers and Readers, Inner and Outer Barristers who, in turn, drew their membership from the apprentices who lived in the Inns of Chancery.[13] The growth and authority of this system resulted partly from the rules of the judges,[14] who not only provided for the numbers of those living in the Inns and hence the numbers' admissible to the bar,[15] but regulated their course of study, their morals and vacations,[16] and even their mode of dress.[17]

The other group of the profession, the attorneys, were closely connected with the courts and directly subject to their orders.[18] In fact early in Elizabeth's

8. Rolls of Parliament i, 84.

9. 4 Henry IV, c. 18.

10. 1 BLACKSTONE'S COMMENTARIES, *23-5.

11. 6 HOLDSWORTH, *op. cit. supra* note 4, at 434; COOKE'S, RULES ORDERS & NOTICES OF THE COURTS OF THE COMMON PLEAS, KING'S BENCH (Michaelmas Term 1654).

12. See Ricker's Case, 66 N. H. 207, 214, 29 Atl. 559, 563 (1890).

13. DUGDALES, ORIGINES JURIDICALES (3d ed. 1680) 322.

14. The Judges only permitted Barristers to practice in their courts [Ricker's Case *op. cit. supra* note 12, at 562-563] and only the Inns could call law students to be Barristers subject to appeal to the Judges. King v. Benchers of Lincoln Inn, 4 B. & C. 855, 107 Eng. Reprints 1277 (K. B. 1825); King v. Benchers of Grays Inn, 1 Douglas 354, 99 Eng. Reprints 227 (K. B. 1780); Booreman's Case, [1642] March 177.

15. *"Imprimis* that no more in number be admitted from henceforth than the Chambers of the House will receive after two to a Chamber." Order 16 yr. of reign of Elizabeth 1574, DUGDALE, *loc. cit. supra* note 13.

16. A typical order reads, "But for the prevention of the great disorders and mischiefs which happen by gaming and other licentious courses lately used in the time of Christmas . . . no Commons shall be kept in an Inn of Court in the time of Christmas and if this order shall not be observed . . . complaint shall be forthwith made thereof to the Lord Chief Justice or any other of the Judges which shall then be in town who will take a speedy and effectual course for the suppressing and punishing thereof." DUGDALE, *op. cit. supra* note 13, at p. 323; for numerous other examples, see *id.*, at p. 310 *et seq.*

17. For instance in the 16th year of the reign of Charles II: "That no fellow of those societies should wear any beard above a fortnight's growth." DUGDALE, *op. cit. supra* note 13, at p. 317.

18. 6 HOLDSWORTH, *op. cit. supra* note 4, at p. 434; MAUGHAM, ATTORNEYS AND SOLICITORS (1825) 16-19.

reign, the Chief Justice of the Court of Common Pleas summoned a special jury to inquire *de omnibus falsitatibus, de rasuris, de contemptibus, et de imprisionibus* which were taking place in the court and also of "late and slack comers." "We shall deprive them of their attorneyship" he said.[19] Again in 1654 "at the time of the Commonwealth when the King's Bench was called the Upper Bench in Michaelmas term", it was provided, "that there should be a Jury every 3 years to inquire into and reform abuses" and it was decided, "to nominate 12 or more practioners each year to examine such persons as should desire to be admitted to be attorneys."[20]

During all the years since Magna Charta, Parliament had been increasing its power at the expense of the crown and becoming the supreme authority in the state. There never was any question of antithesis between the legislature and the judiciary; in fact the two cooperated for the most part in limiting the royal sovereignty and establishing Parliamentary supremacy. In practice, however, the precedent of years of custom was such that Parliament exercised only a small measure of authority and that of a nature auxiliary to rather than destructive of the authority of the courts.[21] As Maugham said: "Parliament legislated upon the subject but the legislation was to exclude the unfit. The statutes always recognized the admission of attorneys was a matter of judicial discretion."[22]

From the foregoing brief review of the common law in this regard the conclusion is inevitable that as one commentator said

" . . . For more than six hundred years it has been the practice of the courts to admit attorneys upon their own examination and that at the time the Colonies separated from the mother country the power of examination and admission of attorneys was vested in the courts."[23]

In New York State before the Revolution, the Colonial governor as the representative of the mother country appointed attorneys and specified the court or courts before which they could practice[24] but, with the advent of the New York Constitution of 1777 and the Federal Constitution of 1789, the American constitutional system was established. Art. XXVII of the New York Constitution provided in part that: "All attorneys, solicitors, and counsellors at law hereafter to be appointed, be appointed by the court and licensed by the first judge of the court in which they shall respectively plead or practice;

19. 9 Elizabeth (1567), COOKE'S RULES & ORDERS, *loc. cit. supra* note 11.

20. MAUGHAM, *op. cit. supra* note 18, at p. 19.

21. See Matter of Graduates, 11 Abbott's Practice 301, 311 n. a, b, c (1860) (note c lists statutes enlarging the right to admission but all are in the 19th century after the 5th year of the reign of Queen Victoria).

22. MAUGHAM, *op. cit. supra* note 18, at 9; Lee, *The Constitutional Power of the Courts over Admission to the Bar* (1899) 13 HARV. L. REV. 242, 245. In fact as Maugham said, (p. 15) from 1606 to 1729 there were no legislative measures enacted. In that year Parliament confirmed the authority of the judges to examine and admit lawyers. 2 George II c. 23 (1729).

23. Lee, *op. cit. supra* note 22, at 245.

24. See Matter of Graduates, 11 Abbott's Practice 301, 312 (1860).

and be regulated by the rules and orders of the said courts."[25] Many years later Chief Judge Cardozo characterized this section as "declaratory of a jurisdiction that would have been implied if not expressed."[26]

The Constitution of 1821, however, omitted this sentence quoted above. Thus, in the absence of any statutory provision relating to the question, the common law as interpreted by the courts would be determinative of the issue.[27] Under the American doctrine of separation of powers, it could hardly be argued that the governor of the state had the power to appoint lawyers simply because the Colonial governor had been so authorized. Nor could the theoretical authority of the English Parliament over the legal profession, which in practice was exercised so sparingly, apply in America where the new concept of three distinct though overlapping spheres of governmental authority, each supreme in its own field, had become so firmly established in the law of the country. Such control would still be valid of course to the extent that the legislature could retain its auxiliary jurisdiction to supplement though not to contravene the rules and regulations of the courts.[28]

In 1823, the legislature passed a statute[29] using the exact language of the Constitution of 1777 but in 1827 the law was revised and this provision omitted.[30] It is significant that the courts, nevertheless, irrespective of whether their common law prerogatives were reaffirmed by the legislative action or not "continued to act upon the theory that the power of regulation was either inherent or implied."[31] The Constitution of 1846 simply confirmed the status at that time.[32]

After the legislature in 1860 had passed an act providing that the professors of the Law School of Columbia College " . . . were empowered to recommend graduates of Columbia for admisson to the Bar,"[33] Henry W. Cooper, a graduate of Columbia, was denied admission by the Supreme Court. He appealed to the Court of Appeals which adopted the reasoning of his counsel Professor Dwight and held that "although the appointment of attorneys has usually been entrusted in this state to the courts, it has nevertheless, both here and in England, been uniformily treated not as a necessary or inherent part of their judicial power but as wholly subject to legislative action."[34] A learned com-

25. N. Y. CONST. (1777) § XXVII.

26. See People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 477, 162 N. E. 487 (1928).

27. N. Y. CONST. (1777) § XXXV "That such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th of April 1775 shall be and continue the law. . . . "

28. See (1937) 36 MICH. L. REV. 84 n. 9, for a compilation of cases. See especially *ex rel.* Hovey v. Noble, 118 Ind. 350, 356-7, 360 (1888). *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899).

29. N. Y. LAWS OF 1823, c. 182, § 19.

30. The provision mentioned in note 29 *supra* was omitted from N. Y. LAWS OF 1827.

31. People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 477, 162 N. E. 487, 491 (1928).

32. N. Y. CONST. (1846) Art. VI, § 5.

33. N. Y. LAWS OF 1860, c. 202, § 1.

34. Matter of Graduates, 11 Abbott's Reports 301, 325 (1860).

mentator has said of Professor Dwight's brief: "[It] contains much of the ancient learning on the subject but the brief is naturally not conceived in a judicial spirit and is quite as interesting for what it omits as for what it contains."[35]

Professor Dwight argued that the Inns were voluntary societies and, hence, not subject to the judges. Such is not the fact.[36] Furthermore he failed to mention the orders promulgated by the courts for the admission and regulation of attorneys and he did not consider the distinction between the Parliamentary form of English government[37] and the American Constitutional form.

As a conclusion to the discussion of this case it is revealing to note the words of protest of the supreme court when it received the decision of the higher tribunal. " . . . the Court of Appeals on an *ex parte* application and argument, without notice to the attorney-general, or any other person, have held the acts of the legislature to be constitutional . . . ".[38]

Despite the *Cooper* decision the courts continued to regulate lawyers[39] and in 1912 their authority was explicitly confirmed by an amendment to the Judiciary Law.[40]

Then finally there is the case of *People ex rel. Karlin v. Culkin* in which Chief Judge Cardozo upheld in sweeping terms the power of the court to investigate members of the Bar, as incidental to the authority of the courts.[41] While dicta on the point in question, the tenor of this decision appears unquestionably to be contradictory to the *Cooper* case. After discussing the

35. Lee, *op. cit. supra* note 22, at p. 253.

36. King v. Benchers of Gray's Inn, 1 Douglas 353 (1780), shows that the Inns did not have the final authority. Although they were not subject to mandamus, as they were unincorporated societies, there was a method of redress, namely, by appeal to the twelve judges as visitors; King v. Benchers of Lincoln's Inn, 4 Barnwell & Cresswell 855 (1825); and they were subject to visitation by the judges. Booreman's Case, [1642] March 17. In fact Chief Justice Cardozo said in People *ex rel.* Karlin v. Culkin, 248 N. Y. 465, 473, 162 N. E. 487, 490 (1928), "short shrift would there have been for the barrister who refused to make answer . . . in defiance of the visitors."

37. One court has said the power possessed by Parliament is more analogous to the fully executed power of a constitutional convention ratified by the people. *In re* Cannon, 206 Wis. 374, 385, 240 N. W. 441, 446 (1932).

38. "When the justices of this court who were sitting in the court of appeals in this matter shall have performed the high duties which the constitution temporarily consigned to them in that court, and shall have returned to their own court, we shall, no doubt, be informed by them of the peculiar circumstances (if any) which may have induced this (as it appears to us) *extraordinary proceeding* on the part of the court of appeals, but in the meantime, to prevent even the appearance of a want of respect for law and order, this court yields, as to these applicants, to the decision of the court of appeals, at the same time respectfully but *earnestly protesting against it,* for reasons, and on the understanding that these admissions are not to be considered as at all conclusive as to future application of a similar character." Matter of Graduates, 11 Abbott's Practice 301, 337 (1860). Italics inserted.

39. Matter of H., an Attorney, 87 N. Y. 521 (1882). *In re* John Percy, 36 N. Y. 651 (1867).

40. N. Y. Laws of 1912, c. 253.

41. 248 N. Y. 465, 162 N. E. 487 (1928).

authority of the judges to regulate the barristers of the Inns and the orders of the courts regulating attorneys, he says of the provision of the New York Constitution of 1777, upholding the authority of the court: "It was declaratory of a jurisdiction that would have been implied if not expressed." He characterizes the Judiciary Law of 1912 as

"restoring the earlier statutes through a renewed declaration that lawyers are subject to the control and power of the court."

Of *Matter of Cooper* all that is said is:

"The question does not now concern us whether the power may be withdrawn or modified by statute whereas the historical analysis of the common law and the interpretations placed upon the constitutional and legislative enactments on the subject reach conclusions diametrically opposed to those enunciated in *Matter of Cooper*."[42]

It seems impossible therefore, to escape the realization that *Matter of Cooper* though not expressly overruled has been inferentially sapped of its vitality.

A review of the authorities in other states shows that the Legislature usually supplements the court in restricting the admission of applicants to the bar on the basis of the general police power of the former.[43] Virtually never does it attempt to curtail or destroy the primary authority of the judiciary. Typical is the doctrine of a Massachusetts case in which the court found that the legislature could provide minimum regulations for the admission of attorneys to the bar but could not compel the judiciary to admit those the court deemed were unfit.[44]

In the federal jurisdiction after the Civil War test oaths were attempted to be imposed upon attorneys as a prerequisite to practice but the Supreme Court upheld the judiciary in sweeping terms.[45] In *ex parte Secombe,* Chief Justice Taney said,

"It has been well settled by the rules and practice of common law courts that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor and for what cause he ought to be removed."

Again the court in speaking of the Judiciary Act of Sept. 24, 1789[46] says

42. See *id.*, at 477, 162 N. E. at 492.

43. See (1937) 36 MICH. L. REV. 84 n. 9 for a compilation of cases. See, especially, *Ex rel.* Hovey v. Noble, 118 Ind. 350, 356, 357, 360, 21 N. E. 244, 245, 246 (1889); *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899). Note 8 lists the minority view of cases supporting Matter of Cooper, chiefly California and North Carolina; note 6, p. 83, lists those cases in which exclusive judicial power and control is enunciated. See, especially, Clark v. Austin, 340 Mo. 467, 101 S. W. (2d) 977 (1936) but note the concurring opinion upholding regulation by both branches of the government.

44. "When and so far as statutes specify qualifications and accomplishments they will be regarded as fixing the minimum and not as setting bounds beyond which the judicial cannot go. . . . There is no power in the General court (in Mass. the legislature) to compel the judicial department to admit as attorneys those deemed by it unfit . . . " *In re* Opinion of Justices, 279 Mass. 607, 180 N. E. 725 (1932).

45. *Ex parte* Secombe, 19 Howard 9 (U. S. 1856). See also, *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Petition Splane, 123 Pa. St. 527, 16 Atl. 481 (1889).

46. *In re* Shorter, 22 Fed. Cas. 16, 18 (1865); Clark v. Austin, 101 S. W. (2d) 977

" . . . the thirty-fifth section of this act is a clear concession to the courts of exclusive jurisdiction over the subject of admission of attorneys and counsellors to practice. . . . Until the passage of the law of January 24, 1865 [test oath]—nearly 80 years—Congress has not attempted to exercise any control over the subject."[47]

We are impelled to the conclusion, therefore, that *Matter of Cooper* stands virtually alone as an *ex parte* case never subjected to criticism or opposing argument. The decision in the case accepted Professor Dwight's history of the common law of the subject which not only is incorrect but also was a partisan presentation of the authorities. Futhermore, the Court of Appeals acquiesced in an interpretation of the constitutional provisions and statutes in the matter that has been controverted by Cardozo's dicta in the *Karlin* case.[48] It has been criticised by editorial comment.[49] The only other states that agree with it are California and North Carolina.[50] Thus the court of appeals might well overrule this anomaly as they overruled a previous decison[51] in *People v. Schweinler*[52] on the less sufficient grounds that the argument in the previous case had been inadequate.[53]

(Mo. 1936). See 36 MICH. L. REV. *op. cit. supra*, note 43, at p. 87, and *In re* Waugh, 32 Wash. 50, 51, 72 Pac. 710 (1903) in which the court said: "It must necessarily be that the court has inherent power to preserve its existence and to fully protect itself in the orderly administration of its business."

47 On the correlative question of disbarment, it does not appear that the legislature ever attempted to prevent the courts from purging their own ranks. It is probably true that the legislature could specify disbarment as a punishment for a crime. Such would be a valid exercise of the police power. "The legislature may enact police regulation for the protection of the public against things harmful or threatening to their safety and welfare." Lee, *op. cit. supra* note 22, at p. 249. *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899). But it could not compel any court to reinstate a disbarred member for, as Chief Justice Taney said in *Ex parte* Secombe, 19 Howard 9 (U. S. 1856) (in which the Supreme Court refused to grant a mandamus to compel the judges of the Supreme Court of Minnesota to reinstate Secombe): "We are not aware of any case where a mandamus has issued to an inferior tribunal commanding it to annul its decision where the decision was in its nature a judicial act within the scope of its jurisdiction and discretion." See also Commonwealth v. Judges, 1 S. & R. 187 (Pa. 1814); *In re* Day, 181 Ill. 73, 54 N. E. 646 (1899); *In re* Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935). Yet the powers of admission and disbarment are necessarily inseparable and hence equally inherent in the judiciary. The Supreme Court itself in *Ex parte* Robinson, 19 Wall. 505 (U. S. 1873) said: "All courts which have the power to admit have the power to disbar."

48. People *ex rel* Karlin v. Culkin, *op. cit. supra.*

49. Lee, *op. cit. supra* note 22, at p. 253-4. See N. Y. L. J., Apr. 6, 1938, p. 1658, col. 1; *id.*, Apr. 7, 1938, p. 1678, col. 1.

50. *Ex parte* Yale, 24 Cal. 241, 85 Am. Dec. 62 (1864); *In re* Applicants for License, 143 N. C. 1, 55 S. E. 635 (1906). But even these decisions have been limited by *In re* Lavine, 2 Cal. (2d) 324, 41 P. (2d) 161 (1935) and *In re* Ebbs, 150 N. C. 42, 63 S. E. 190 (1908).

51. People v. Williams, 189 N. Y. 131, 81 N. E. 778 (1907).

52. People v. Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

53. The court might also overrule on the basis of Klein v. Maravelas, 219 N. Y. 383, 386, 114 N. E. 809, 811 (1916) in which it said, "Our past decisions ought not stand in opposition to the uniform convictions of the entire judiciary of the land."

Hence it is contended that a review of the history of the subject shows that the rejection of this constitutional provision by the people of the State of New York leaves untouched the preexisting prerogatives of the courts. In the first place, a survey of the English common law before 1777 proves the courts actually exercised this power in their own right. Then, an analysis of the legislative and constitutional enactments of the State of New York on the subject confirms the intent of the people to delegate such regulation and control to the judiciary. Furthermore, a consideration of the single case in New York upholding the authority of the legislature in this respect reveals that not only was it an *ex parte* proceeding, never tested by opposing argument or criticism, but also, it has been inferentially undermined by a subsequent decision of the same court. It has been almost universally criticized by writers and courts of other jurisdictions as unsound in law and dangerous as a precedent. If the legislative branch of the government can encroach upon the judicial, it can control the conduct of judges and juries, and eventually compel courts to do its bidding. Thus, the independence of the judiciary would be threatened;[54] our fundamental concept of three separate branches of government each supreme in its own sphere would be defeated; and the courts would be subjected to the varying fortunes that the electorate metes out to its political representatives. Finally as a practical matter the judges are more adequately qualified than the members of the legislature to determine the necessary standards of education and character required for the practice of their own profession. Thus, it is argued that in spite of the *Cooper* case, the actual authority the judiciary has exercised over its members for six centuries of English common law and for over 150 years in New York State might well impel the Court of Appeals to reverse *Matter of Cooper*. There is plausible basis for the conclusion that the courts today have the paramount power in their own right without the necessity for any constitutional or legislative enactment, to regulate the admission of attorneys to the bar and their subsequent conduct and practice.

SEARCH AND SEIZURE—WIRETAPPING.—The new Constitution of the State of New York raises the citizens' immunity from unreasonable search and seizure and from unreasonable interceptions of their telephone and telegraph messages to the status of a constitutional privilege.[1] A more restricted right than that

54. Note the recent threat to the courts of the state of Pennsylvania where the state legislature attempted to suspend retroactively and prospectively a Grand Jury investigation of civil officers subject to impeachment until the House of Representatives had completed its investigation. N. Y. Times, Oct. 4, 1938, p. 52, col. 1.

1. NEW YORK CONST. art. I, § 12. "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that the evidence of crime may be thus obtained, and identifying the particular means of communication,

granted in the new Constitution is at present a part of the Civil Rights Law.[2] This statutory right, now displaced, was more sweeping inasmuch as the statute made no provision against the wrongful interception of telephone and telegraph messages.

Cases involving search and seizure involve legal problems in three fields. One of these problems appears in the tort law where an unreasonable search or seizure may be a false arrest or a trespass to property. Another appears in the criminal law when it is inquired whether the party committing the unreasonable search has violated the Penal Law.[3] But it is in the law of evidence that the most complex question of all is raised when it is asked if the evidence obtained in an illegal search may be admitted in court.

In general, a search and seizure is unreasonable and violative of constitutional rights, if it is conducted without a search warrant, or if the officers exceed the limits of the warrant. But while the individual, private or official, who conducts an illegal search may be prosecuted criminally and held civilly for trespass to the property or for the false imprisonment of the person who has been wrongfully searched, the evidence secured by such action is not inadmissible in court merely because the search and seizure was unauthorized.[4] The common law rule that the admissibility of evidence is not affected by the means by which it was obtained has been followed in New York as well as in many other states.[5] Thus, the court will not inquire into the means by which the witnesses acquired their information. In arguing that such evidence should be excluded, it has been contended that the rule of exclusion should be applied especially where a state official has committed the wrong. But Justice Cardozo, writing for the Court of Appeals, stated:

"Evidence is not excluded because the private individual gathered it by lawless force. By the same token, the State, when prosecuting an offender against the peace and order of society, incurs no heavier liability."[6]

Moreover, he maintained that it is in the proper province of the Legislature

and particular person or persons whose communications are to be intercepted and the purpose thereof."

2. N. Y. CIV. RIGHTS LAW (1923) § 8. New York has been one of the few states where the right was not included among the constitutional guarantees.

3. N. Y. PENAL LAW (1909) §§ 1846, 1847. The difficulty lies in the fact that few, if any, offending officials are prosecuted under these laws.

4. 4 WIGMORE ON EVIDENCE (2d ed. 1923) § 2183; Atkinson, *Admissibility of Evidence Obtained through Unreasonable Searches and Seizures* (1925) 25 COL. L. REV. 11. The reason for the rule is said to rest upon the requirement that no collateral issues be introduced on trial. It has also been suggested that competent evidence should not be excluded because of the illegality in obtaining it as this will penalize the prosecutor of crime unduly.

5. People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903), *aff'd*, 192 U. S. 585 (1903); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926); Commonwealth v. Wilkins, 243 Mass. 356, 138 N. E. 11 (1923); State v. Lyons, 99 N. J. L. 301, 122 Atl. 758 (1923); Commonwealth v. Dabbiero, 290 Pa. 174, 138 Atl. 679 (1927). *Contra:* People v. Castree, 311 Ill. 392, 143 N. E. 112 (1924); State v. Buckley, 145 Wash. 87, 258 Pac. 1030 (1927). See Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

6. People v. Defore, 242 N. Y. 13, 22, 150 N. E. 585, 588 (1926).

and not of the Courts to make evidence inadmissible because obtained by illegal means.[7] This rule in New York applied to wiretapping as well.[8]

In the Federal Courts the question of unreasonable search and seizure arises under the Fourth Amendment to the Federal Constitution. In its earlier decisions, the Supreme Court followed the common law rule;[9] but after some years, it began to limit and narrow the rule. Thus evidence obtained by an illegal search was required to be returned and could not be used on the trial, if defendant made a motion to that effect before trial.[10] And a later case dispensed with that requirement where the fact that the search was illegal is undisputed.[11] Finally, it was held that where the search was made by government agents, the evidence is inadmissible, although it could be introduced if secured by anyone else.[12] The Supreme Court decided the question of wiretapping in the case of *Olmstead v. United States*.[13] The evidence had been obtained by government officials. Therefore, if wiretapping were declared an unreasonable search and seizure, the evidence would have to be excluded. That case held that there was no invasion of constitutional rights in the use of evidence consisting of private conversations intercepted by means of wiretapping. The majority argued that there was no violation of property rights because telephone wires are not part of defendant's home or office; and that a liberal construction of the Constitution does

". . . not justify the enlargement of the language employed beyond the possible practical meaning of houses, person, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[14]

But the dissenting judges were strongly opposed to the activities of government agents in such "dirty business".[15] While, then, the majority opinion in

7. See *id.* at 23, 150 N. E. at 588.

8. People v. McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41 (2d Dep't 1917) (a racing bookmaker convicted of professional gambling by the use of evidence obtained by wiretapping); Matter of Davis, 252 App. Div. 591, 299 N. Y. Supp. 632 (1st Dep't 1937) (wire tapped evidence was admitted in a disbarment proceeding to show defendant's connection with racketeers).

9. People v. Adams, 192 U. S. 585 (1903).

10. Weeks v. United States, 232 U. S. 383 (1914) (letters and correspondence seized without authority).

11. Agnello v. United States, 269 U. S. 20 (1925).

12. Burdeau v. McDowell, 256 U. S. 465 (1921) (papers stolen and then turned over to government law enforcement agencies).

13. 277 U. S. 438 (1928). See (1928) 27 MICH. L. REV. 78, where it is suggested that the prosecution of the robbers of a Grand Trunk Train, which came up when the Olmstead case was before the court, and which involved evidence obtained by wiretapping, without which the successful prosecution of the criminals would be impossible, may have influenced the decision.

14. Olmstead v. United States, 277 U. S. 438, 465 (1928).

15. See *id.*, at 470, dissenting opinion of Holmes, J. In New York, the Appellate Division, although they admitted evidence so obtained, conceded that ". . . . reckless and unwarranted wire-tapping in pursuit of a system of espionage by governmental agents cannot be too strongly condemned." Matter of Davis, 252 App. Div. 591, 599, 299 N. Y. Supp. 632, 640 (1st Dep't 1937).

the *Olmstead* decision held that there was no search and seizure because there was no trespass, the dissent noted that:

"It is not the breaking of his doors, and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and personal property when that right has never been forfeited by his conviction of some public offense. . . ."[16]

Within the ten years since the decision, the courts seem to be turning toward the view of the minority. In 1937, *Nardone v. United States*[17] came before the Federal Courts. The evidence in the case had been obtained by wiretapping, but the question raised was whether it would be admissible in view of the provisions of the new Federal Communications Act.[18] The lower court held that the *Olmstead* case would permit the admission of the evidence obtained by government agents because Congress had made no express provision regarding the admissibility of evidence in the Federal Communications Act.[19] But, when the case was appealed to the Supreme Court, the decision was reversed. The Court interpreted the statute to exclude the evidence and declared that

"Congress may have thought it less important that some offenders should go unwhipped, than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."[20]

The decision of the Supreme Court in the *Nardone* case raises an interesting problem. That case declared that the provisions of the Federal Communications act which prohibit the divulging of intercepted communications applies to all persons including government officials,[21] and governs interstate communications. Thus, if conversation were intercepted between a party in New York, and one in another state, the Federal law prevents its admission in a Federal Court. If the evidence so obtained were offered in a New York court, although under the New York rule it would be admissible, the court might have to rule it out because of the Federal statute in question.

The cases involving wiretapping have usually been criminal cases. However, in the case of *Matter of Davis*,[22] the referee excluded the wiretapped evidence on the ground that the disbarment of an attorney was a civil proceeding, and that the evidence would therefore be inadmissible. But the Appellate Division allowed it arguing that it had not been secured in the first instance for use in the disbarment action, but had been inadvertently discovered while

16. Bradley, J. in Boyd v. United States, 116 U. S. 616, 630 (1885), quoted in the dissent of Brandeis, J. in Olmstead v. United States, 277 U. S. 438, 474 (1928).

17. Nardone v. United States, 302 U. S. 379 (1937).

18. 47 U. S. C. A. 605 (1934) ". . . 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. . ."

19. Nardone v. United States, 90 F. (2d) 630 (C. C. A. 2d, 1937).

20. See Nardone v. United States, 302 U. S. 379, 383 (1937).

21. See notes 19 and 20, *supra*.

22. 252 App. Div. 591, 299 N. Y. Supp. 632 (1937).

the officers were listening to the conversation of other criminals whose arrest was their primary motive.

The policy of the law in its provisions against unreasonable search and seizure is surely praiseworthy. They were made a part of the Bill of Rights to protect the people from ruthless acts of trespass on the part of government officials; to protect the right of privacy from interference by those in authority. Wiretapping is one of the most insidious means of interfering with that very right which constitutional guarantees are supposed to protect.[23] It is a secret means of obtaining desired information; the individual whose wires are tapped in most cases is unaware that his telephone conversations are being intercepted. It is a crime for individuals to engage in the practice,[24] and the practice is no more innocent because it is done by one who wears an official badge. To hold with New York that the evidence is admissible regardless of how it was obtained seems to make the provisions of the guaranty meaningless. The sanctions contained in the law, civil suit or criminal prosecution of the official involved, seem to be very inadequate and insufficient to make up for the injustice done.

It is of course true that the detection and conviction of criminals would be rendered more difficult by the literal fulfillment of the guaranty. Yet that does not justify the invasion of the rights of privacy and freedom which belong to all the people. While the rule of evidence remains as it stands, however, and evidence continues to be admitted despite the illegality of the means by which it was obtained, the situation which evoked the recent amendment remains unremedied. The new provision creates a constitutional means for securing evidence by which law enforcement agencies can more successfully prosecute criminals. It legalizes wiretapping in some circumstances. It is thus an advantage to the prosecutor and the detective. It does not expressly prevent the use of wiretapping illegally. It is possible that the courts have persisted in the rule of admissibility because of the fact that the provisions against unreasonable search and seizure were merely statutory.[25] Whether or not the courts will change their views now that the immunity is constitutional remains to be seen. The hope that they might was one of the reasons which prompted some of the delegates at the Constitutional Convention to vote in favor of the provision.[26] It may well be that the restrictions on wiretapping, now incorporated into the New York Constitution, may call for a reconsideration of the *Defore*[27] case, and that confronted with the question again, the court might revise its views.

23. See (1928) 27 MICH. L. REV. 927, suggesting that public interest requires the restriction of the right of privacy; that the criminal requires no protection; and that when honest private people begin to be molested, it will be time enough to restrict offending officials. *Cf.* (1928) 77 U. OF PA. L. REV. 139.

24. N. Y. PENAL LAW (1909) §§ 552, 1423 (6).

25. See note 7, *supra*.

26. Proceedings of the Constitutional Convention (1938), Record No. 44, pp. 872-897.

27. See note 6, *supra* and text referring thereto.