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The 1957 New York Legislation on Wire-Tapping Problems

York standard for dismissing tort suits, they might be put into the rather inconsistent position of granting a dismissal on a lesser showing of inconvenience than that required for a transfer. For these reasons the Second Circuit has held that federal district courts are not bound by the state forum non conveniens rule.[34] The Supreme Court expressly refused to pass on the question in *Gulf Oil Corp. v. Gilbert* and again in *First Nat'l Bank v. United Airlines.*[35] However, the dissenting opinion of Justice Frankfurter in the *First Nat'l Bank* case[36] indicates that the question is not entirely free from doubt. Should the Supreme Court ultimately find that federal courts must follow the state law in this regard, the damage at least will not be as great as it would have been before the Court reshaped that law in *Gulf Oil Corp. v. Gilbert.*

CONCLUSION

It is not certain that the legislature intended to pass section 225, subdivision 4, with a full burden of common-law restrictions. It is clear, however, that the section immediately inherited these restrictions. The history of the section illustrates what occurs when the legislature does not express its intent with full particularity. The statute has, in effect, undergone significant changes since its enactment. While this type of legislating may detract somewhat from the certainty and predictability of the law, it does add greatly to its flexibility. This flexibility is one of the great heritages of the common-law system. It is precisely because the legislature enacted section 225, subdivision 4, without codifying with it all of its common-law restrictions that the section was able to keep pace with the modern trend of the law.[37]

THE 1957 NEW YORK LEGISLATION ON WIRE-TAPPING PROBLEMS

Chapters 879-881 of the 1957 New York Sessions Laws create a new felony, entitled "eavesdropping," and outlaw all wire tapping done without the issuance of an *ex parte* order.[1] The procedure for obtaining such an order has been altered somewhat in an attempt to give the judiciary greater control over official wire tapping,[2] and in line with this a new section has been added to the

34. Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955); Gilbert v. Gulf Oil Corp., 153 F.2d 883 (2d Cir. 1946), rev'd on other grounds, 330 U.S. 501 (1947).

35. 342 U.S. 396 (1952).

36. Id. at 401; cf. Woods v. Interstate Realty Co., 337 U.S. 535 (1949).

37. A discussion of what constitutes doing business is not within the scope of this article. The foreign corporation must be doing business at the time process is served. Generally speaking this means that at that time it must still be exercising its corporate powers within the state. "Even then, there are nice distinctions as to the extent of its submission when the cause of action is unrelated to the business here transacted." Gaboury v. Central Vt. R.R., 250 N.Y. 233, 236, 165 N.E. 275, 276 (1929).

1. N.Y. Pen. Law § 738.

2. N.Y. Code Crim. Proc. § 813-a.

Code of Criminal Procedure to penalize law enforcement agents who neglect to obtain the required order.[3] Provision is also made to exclude from evidence illegally obtained wire-tap information in any civil action.[4] These sweeping changes represent the most extensive overhaul of the wire-tap law in New York since the adoption, before the turn of the century, of the original statutes.

The Former Statute

New York has long proclaimed wire tapping without a court order to be a criminal offense,[5] just as it has prohibited the wrongful divulgence of the contents of telegraphic and telephonic communications,[6] and the possession of wire-tapping instruments under circumstances evincing an unlawful intent to use them.[7] Yet in spite of these statutes the gathering of evidence by means of wire taps in New York and elsewhere became a million dollar industry employed by businessmen, labor leaders, government officials and even suspicious husbands.[8]

A study of the history of the wire-tapping statutes reveals how ineffective they have been in combatting the misuse of wire-tap devices. Section 1423(6) of the Penal Law which made wire tapping a crime[9] was included in article 134 of the Penal Law which defines malicious mischief, for the reason that wire tapping originally involved a physical interference with wires before the act of listening or interception occurred. This first aspect apparently seemed of prime importance to the state legislatures in the early days of telegraphic communication.[10] Since it was a malicious act, it was not altogether strange that the courts should require as evidence of guilt ". . . something more than a voluntary act and more also than an intentional act which is in fact wrongful."[11] The word

3. N.Y. Code Crim. Proc. § 813-b.

4. N.Y. Civ. Prac. Act § 345-a.

5. N.Y. Pen. Law § 1423(6). The salient portion of the statute is as follows: "A person who wilfully or maliciously displaces, removes, injures, or destroys:

". . . .

"6. A line or telegraph or telephone wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication, or report passing over it, in this state . . . or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned. . . .

". . . .

"9 . . . is punishable by imprisonment for not more than two years."

6. N.Y. Pen. Law § 552.

7. N.Y. Pen. Law § 552-a. This law was passed in 1949 as the result of the exposure of a plot to tap the telephones of Mayor William O'Dwyer and several other city officials. See N.Y. Times, March 13, 1949, p. 1, col. 8; April 13, 1949, p. 1, col. 1.

8. Spindel, Who Else Is Listening?, Collier's June 10, 1955, pp. 25, 26.

9. See note 5 supra.

10. Rosenzweig, The Law of Wire Tapping, 33 Cornell L.Q. 73 (1947).

11. Wass v. Stephens, 128 N.Y. 123, 128, 28 N.E. 21, 23 (1891).

"wilfully" as used in the statute has been held to include ". . . the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness."[12] This standard has been reiterated in many cases,[13] and in 1950 the appellate division decided the famous *Appelbaum* case,[14] holding that a subscriber to a telephone could authorize a tap "to vindicate his paramount rights," among which the court noted business affairs, social relations and marital status.[15] The court could find no malicious mischief in acts so motivated, and professional wire tappers regarded this as a license to operate openly. Prosecutions for violation of section 1423(6) became virtually non-existent.

Two other statutes dealt with wire tapping by private individuals, but they too proved to be of little avail. Section 552 of the Penal Law[16] prohibited employees of telephone and telegraph companies from disclosing to unauthorized parties the contents of messages entrusted to them, and made it a felony for anyone to connive with an employee to obtain such knowledge. The courts held that this statute ". . . was intended to preserve telephone and telegraph messages from wrongful use by employees . . ."[17] but aside from this its meaning and application remained uncertain. It should be noted, too, that under this section proof of connivance was required, an element usually absent in the case of professional wire tappers who need little assistance from anyone. The other statute dealing with the problem, section 552-a of the Penal Law, made it a crime to possess wire-tapping instruments for an unlawful purpose. There is, however, no record of any conviction for violation of this statute.

12. Ibid.

13. Lamb v. Chaney & Son, 227 N.Y. 418, 422, 125 N.E. 817, 818 (1920). "The act is malicious when the thing done is with the knowledge of plaintiff's rights and with the intent to interfere therewith. In a legal sense, it means a wrongful act, done intentionally without just cause or excuse. . . . It does not mean actual malice or ill-will, but consists in the intentional doing of a wrongful act without legal justification." People v. Raeder, 161 Misc. 557, 561, 292 N.Y. Supp. 447, 452-53 (County Ct. 1937). "This is a penal statute and must be strictly construed. The act of the defendant was intentional, headstrong, and voluntary. In order to find him guilty of the crime charged, the court must find that his act was wantonly malicious and done with desire and intention to injure the complainant and destroy its property."

14. People v. Appelbaum, 277 App. Div. 43, 97 N.Y.S.2d 807 (2d Dep't), aff'd, 301 N.Y. 738, 95 N.E.2d 410 (1950).

15. Id. at 45, 97 N.Y.S.2d at 810.

16. The salient provisions are as follows: "A person who:

1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic or telephonic message by connivance with a clerk, operator, messenger, or other employee of a telegraph or telephone company; or,

2. Being such clerk, operator, messenger, or other employee, wilfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, or of which contents he may in any manner become possessed . . . is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment."

17. People v. McDonald, 177 App. Div. 806, 810, 165 N.Y. Supp. 41, 44 (2d Dep't 1917).

This was, in general, the picture that was presented to the 1938 New York constitutional convention. No measures were enacted to correct or control the situation, but on the contrary the constitution was amended to sanction the issuance of *ex parte* orders authorizing law enforcement agencies to tap wires for the purpose of preventing crime.[18] The constitutional authorization was further spelled out in 1942 in section 813-a of the Code of Criminal Procedure, and it is the authority for New York police wire tapping today. In substance the statute authorized a justice of the supreme court, a judge of a county court, or of general or special sessions to issue an *ex parte* order for the interception of telegraphic or telephonic communications. The order was applied for by a district attorney, the attorney general or any officer of a police department above the rank of sergeant, the application stating that there was reasonable ground to believe that evidence of a crime might be obtained in such manner. The applicant had to state the telegraph or telephone line, and the persons whose communications were to be intercepted; and the judge could examine the applicant for the order or any witness under oath to determine whether reasonable grounds existed for the issuance of the order. The order, if issued, was effective only for the period of time specified in the order, but in no case was the time to exceed six months unless extended by the judge who issued the order.

In such manner was the framework laid for a supervised wire-tapping system, and hardly had the system begun to operate when reports of flagrant abuse became common. New York Special Sessions Justice Frank Oliver testified that the court order has proved ineffective in protecting the citizen, and that delegates to the constitutional convention never imagined that such orders "would be issued on trivial grounds or in cases involving only suspicion of a misdemeanor offense."[19] One prominent wire-tapping expert stated, "Sometimes the New York cops work on a court order, but often they don't bother to apply for one . . ." and as to section 1423 of the Penal Law, "No one seems to pay any attention to it."[20] An investigation into police wire tapping conducted by the Kings County Grand Jury in 1950 disclosed that much of the information gained by police wire tapping was being used to "blackmail and shakedown bookmakers."[21] As evidence they cited the Harry Gross case where it was shown that Gross paid fortunes to the New York police to keep them from using information gathered by wire taps.

With such weakness in the law of unofficial wire tapping and such abuse in the practice of official wire tapping the need for reform grew more evident.[22] Legislation was drafted in 1956 to remedy the situation but was vetoed by Governor Harriman. While stating that he considered the measures worth while, he said, "I am faced with opposition which cannot be disregarded."[23] He

18. N.Y. Const. art. I, § 12.
19. 1 Editorial Research Rep. 179, 191 (1949).
20. Mellin, I Was a Wire Tapper, Saturday Evening Post, Sept. 10, 1949, pp. 19, 57.
21. N.Y. Times, Dec. 28, 1950, p. 19, col. 1.
22. Id., Oct. 2, 1950, p. 15, col. 6; Dec. 28, 1950, p. 19, col. 1.
23. Message of the Governor, N.Y. Sess. Laws 1956, p. 1770 (April 20, 1956).

referred to the claims by district attorneys and police of New York that the legislation would weaken the powers of law enforcement agencies in fighting crime. These objections have been considered by the legislature and the new laws drafted in the 180th session met with Governor Harriman's favor, when he approved Chapters 879-881 of the 1957 New York Session Laws.[24]

The Present Statute

Chapter 881 represents a complete revamping of the law of private or unofficial wire tapping. It takes a step long overdue by deleting that portion of section 1423(6) of the Penal Law which deals with wire tapping, thus leaving that statute to deal exclusively with malicious mischief as was its original intent. To free the term for a new use, the misdemeanor of eavesdropping, as defined in an innocuous section[25] of the Penal Law, is repealed, and a new felony entitled "eavesdropping" has been created.[26] Wire tapping by private individuals is now included within the definition of eavesdropping as set forth in section 738 of the Penal Law[27] and in substance the statute makes it a felony for any person not a party to the call to use an instrument to overhear or record a telephone or telegraph communication. It also forbids the use of an instrument to overhear or record the deliberation of a jury or any conversation for that matter if one is not present at such conversation. An exception is made for the normal operations of a telephone or telegraph company,[28] and the law enforcement officer acting lawfully.[29] The "person" who can commit this offense is ". . . any individual, partnership, corporation or association including the subscriber to the telephone or telegraph service involved. . . ."[30] The felony is punishable by imprisonment for not more than two years.[31]

To consolidate the law of private wire tapping, section 552-a of the Penal Law, which outlawed the wrongful possession of wire-tapping instruments, and

24. Message of the Governor, N.Y. Sess. Laws 1957, p. 1880 (April 23, 1957).

25. "A person who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor." N.Y. Pen. Law § 721.

26. N.Y. Pen. Law art. 73.

27. "A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or,

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or,

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such a jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping." N.Y. Pen. Law § 738.

28. N.Y. Pen. Law § 739.

29. N.Y. Pen. Law § 741.

30. Ibid.

31. N.Y. Pen. Law § 740.

section 552, which prohibited employees of the companies from revealing communications to unauthorized parties, are both repealed, and substantially included as sections 742 and 743 of the Penal Law. Furthermore, the statute now obligates telephone and telegraph companies to report any violation of this law coming to their attention,[32] and makes it a misdemeanor except in a trial or other proceeding for a person wilfully to disclose to anyone but the telephone or telegraph company, or the agency making the application, any information concerning an *ex parte* order applied for under section 813-a of the Code of Criminal Procedure.[33]

Of all the changes introduced by the new laws, the creation of the felony of eavesdropping should prove the most effective. By taking the crime of wire tapping (eavesdropping) out of article 134 and the malicious mischief statutes, the legislators have put teeth in the law, and there can be little doubt that it will seriously curtail wire tappers. But will it achieve the complete destruction of unofficial wire taps? In its favor it may be said that eavesdropping as defined in section 738 of the Penal Law is wide enough to include all of the present mechanisms used to wire tap,[34] the words, "any instrument," covering the field adequately. As for rendering the telephone or telegraph a safe means of communication, the statute leaves something to be desired. Though a subscriber as such is now prohibited from tapping his phone, and the effect of the *Appelbaum* case is nullified,[35] still the law permits either the sender or receiver of a call to record the call without notification to the other party. This ignores the right of privacy of the other participant in the conversation and encourages illegal wire tapping through planted calls by informer-callers. To protect all parties concerned it would seem that the permission of the party whose conversation is being recorded should be required by law.

Another helpful improvement is the requirement that the telephone and telegraph company disclose any wire tapping they come upon. Until now there has been no obligation upon them to do this and as a rule they have eschewed the unfavorable publicity that would attend such a disclosure. This has in no small measure aided eavesdroppers in the past since the telephone and telegraph companies are the principal parties who might discover a wire tap.[36] With the knowledge that the companies will now inform upon them, wire tappers will be somewhat more careful, though with modern devices even the telephone company can rarely discover a tapped line.

Official Wire Tapping

Chapter 881, by adding a new felony to the Penal Law, is a great step in the direction of wiping out the wire-tapping problem in New York. By its terms, however, it is limited to unofficial wire tapping, and the problem of police wire

32. N.Y. Pen. Law § 744.

33. N.Y. Pen. Law § 745.

34. For an excellent summary of modern methods of wire tapping see Westin, The Wire Tapping Problem, 52 Colum. L. Rev. 165, 197-200 (1952). A more detailed analysis can be found in Spindel, Who Else Is Listening?, Collier's, June 10, 1955, pp. 25-27.

35. See p. 542 supra.

36. Spindel, supra note 34 at pp. 48-50.

tapping is left to chapter 879. The first section of this chapter amends section 813-a of the Code of Criminal Procedure and is an attempt to make more stringent the prerequisites for an *ex parte* order. Whereas the 1942 statute required an *ex parte* order for the "interception" of telegraphic and telephonic communications, the new law extends this also to the "overhearing or recording" of these communications. This is but the recognition by the legislators that modern scientific advances allow a wire tapper to record a conversation without technically "intercepting" it. The procedural requirements are also changed so that instead of merely identifying the "line" or "means of communication" the applicant must now specify the telephone number and, in the case of telegraph, the specific telegraph line. There has also been added a mandate to the issuing judge that he "shall satisfy himself" of the existence of reasonable grounds for the granting of the order. Lastly, and this may prove the greatest safeguard against abuse, the order is now valid for a maximum of two months instead of the six month period in the old statute. The order may still be renewed upon application but the judge must satisfy himself that such renewal is in the interest of justice.

The question that immediately presents itself is whether these procedural changes will terminate the "shakedowns," the blackmail, the fraud and the host of other abuses that occasioned them. It is submitted that they will be but slightly corrected by the new law. To begin with, it is generally agreed that wire tapping is, as Justice Holmes put it, "dirty business."[37] There is not the space to consider all the arguments for and against the practice of wire tapping by police, but the consensus of considered thought on the matter is that wire tapping should be allowed for a limited number of offenses, all of which are felonies.[38] As was noted above,[39] it does not seem to have been the intent of the legislature, when they authorized police wire tapping in 1938, to extend its use to the detection of misdemeanors. Yet the statute, as it read then, and still does, authorizes its use if "evidence of crime may be thus obtained."[40] The use of wire taps for detection of minor criminal offenses is an indiscriminate use of a privilege which can be justified only in the face of compelling urgency.

That the police should have the right to tap wires is not questioned in view of the many beneficial results obtained by this practice. But, as with so many other powers, this power has to be restricted. Nevertheless, it is submitted that though the statute tightens the procedure for the granting of *ex parte* orders, and gives the judiciary greater control by limiting their validity to two months, it does not completely solve the problem of police abuse. The grand jury which investigated the problem in 1950 submitted fourteen recommendations to prevent further abuses by police,[41] but these recommendations have been substantially disregarded in the new statute. It was established that no records were kept of the telephone conversations intercepted so that officers procured

37. Olmstead v. United States, 277 U.S. 438, 470 (1928) (dissenting opinion).
38. Westin, supra note 34, at 203.
39. See note 19 supra.
40. N.Y. Code of Crim. Proc. § 813-a.
41. N.Y. Times, Dec. 28, 1950, p. 19, col. 1.

information which they were able to sell without suspicion of their superiors.[42] The authority to tap telephones has been obtained on false affidavits.[43] Applications for wire-tapping warrants were made without any information to support the requests, and "this was admitted practice in many parts of the Police Department. Without facts and without any information, members of the department supported their applications with such statements as a matter of convenience and as an expedient to obtain an order."[44] There is nothing in chapter 879 which will correct this situation. It would have been an easy matter for the legislature to require that the applicant for the order appear personally and swear to the truth of his affidavit instead of leaving this as merely an optional step. Where the affiant is making his request upon information and belief he should be required to state his precise sources. The applicant should be compelled to state whether an order to tap the same phone has ever been issued before, and thus close the loophole of going to separate judges for consecutive orders. The law should require that a specific individual be named to supervise the wire tapping, and he should be charged with keeping written records and with submitting daily reports to his superiors. Furthermore, this individual should be legally bound to secrecy in connection with all that he has learned from his wire-tapping activities. None of this does the law require, and because it is silent on these points there is little reason to believe that the situation will improve.

It must be conceded that the second section of chapter 879 will help to allay the problem. By adding a new section to the Code of Criminal Procedure[45] it attempts to correct the most obvious defect of the old system, the lack of a sanction against errant policemen. Section 1423(6) dealt with malicious mischief and, so long as the police officer acted under the mantle of crime detection, no crime could be charged against him.[46] Under the new law any officer, not a sender or receiver of a call, who wilfully wire taps or who aids or permits another to do so without consent of either the sender or receiver thereof and without an order as provided for under section 813-a shall be guilty of a felony punishable by imprisonment for not more than two years. At first blush, this has great merit, but upon a closer scrutiny one wonders how effective it will be. It does not penalize the obtaining of an order on false or superficial grounds. Nor does it penalize the improper use of the material culled from wire tapping. It merely states that any officer who acts without an order is liable to punish-

42. Ibid.

43. Ibid.

44. Statement by Assistant District Attorney J. Helfand, N.Y. Times, Dec. 28, 1950, p. 19, col. 1.

45. N.Y. Code Crim. Proc. § 813-b provides that: "Any law enforcement officer, not being a sender or receiver of a telephonic communication, who wilfully and by means of instrument intercepts, overhears or records a telephonic communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof, and without an order as provided for under section eight hunded thirteen-a of this code, shall be guilty of a felony punishable by imprisonment for not more than two years."

46. People v. Hebberd, 96 Misc. 617, 162 N.Y. Supp. 80 (Sup. Ct. 1916).

ment, and even this is of questionable importance. The illegal act will not infrequently be committed at the direction of or, at least, in accordance with the policy of the head of the department charged with law enforcement. Even if this is not the case, it must be agreed that it is usually done for the purpose of securing a conviction which, of course, will make a better record for the prosecutor. He cannot be expected to turn upon a guilty subordinate and charge him with obtaining the evidence illegally. Adding a penal statute alone would not appear to be a sufficient deterrent.

THE ADMISSIBILITY OF ILLEGALLY OBTAINED WIRE-TAP EVIDENCE

It has been suggested that the best sanction against illegal wire tapping by police would be a rule excluding evidence obtained by such means. Historically, this has not been the law of New York, and since this is an integral part of the problem of wire tapping, it deserves special consideration. Broadly speaking, the issue raised is this: is evidence illegally obtained admissible? Two views prevail, the federal courts excluding such evidence, and the majority of state courts accepting it.[47]

Consideration of the federal rule can begin with *Weeks v. United States*[48] in which the Court held that the admission of illegally obtained evidence would violate a defendant's constitutional rights.[49] This was brought to bear upon the problem of wire tapping in 1928 in *Olmstead v. United States*[50] where the court held wire-tap evidence admissible. It had been argued on the authority of the *Weeks* case that such evidence was illegal, being an unreasonable search and seizure within the prohibition of the fourth amendment.[51] The Court rejected this saying that the fourth amendment protects only "tangible material effects" and "actual physical invasions," not "projected voices."[52] The *Olmstead* doctrine did not long control the issue, for in 1934 Congress enacted section 605 of the Federal Communications Act which prohibited any unauthorized person from intercepting and divulging any communication sent by wire or radio.[53] In

47. See Rosenzweig, The Law of Wire Tapping, 33 Cornell L.Q. 73-75 (1947).

48. 232 U.S. 383 (1914).

49. The leading case of Boyd v. United States, 116 U.S. 616 (1886), was the first United States Supreme Court decision to set forth a view directly opposed to the common-law doctrine of admissibility of illegally obtained evidence. The view expressed in the Boyd case, which was based upon violation of the Fourth and Fifth Amendments, prevailed until 1904, when the Supreme Court of the United States upheld the New York Court of Appeals (which had sanctioned the English and majority view of admissibility), in Adams v. New York, 192 U.S. 585 (1904). The dictum in the Adams case conflicted with the Boyd doctrine, and it was not until the decision in the Weeks case that the federal position became firmly established.

50. 277 U.S. 438 (1928).

51. U.S. Const. amend. IV.

52. The court believed that "Gouled v. United States (theft of private papers) carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication." Olmstead v. United States, 277 U.S. 438, 463 (1928).

53. 47 U.S.C.A. § 605 (1946). The pertinent section reads: "and 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. . . ."

Nardone v. United States[54] the United States Supreme Court held that the statute's "no person" includes federal agents and that the divulging of communications to "any person" precludes testimony in a federal court as to the contents of intercepted messages. The Court expanded the scope of its rulings in *Weiss v. United States*[55] when it held that since it is impossible for an agent to separate interstate calls from intrastate calls as they come over the wires, section 605 must be read to prevent both kinds of interception.

The majority of the states, however, follow the common-law doctrine that the illegal manner by which evidence is obtained is not a valid objection to its admissibility.[56] New York holds this view.[57] Applying this doctrine to wire-tap evidence it was held in *People v. McDonald*[58] that such evidence even when obtained in violation of section 1423(6) of the Penal Law is admissible. Thus, the wire tapper's labor, even though performed in clear and uncontested violation of the law, might profit both the wire tapper and his client. The situation was the subject of much discussion at the New York constitutional convention of 1938, but no prohibition against the admission of illegally obtained wire-tap evidence was incorporated into the amendment authorizing police wire taps. The omission of such a provision caused much debate and the approval of the amendment without it was partly due to the vote of delegates who expected the legislature or the courts to remedy the omission.[59] Only now are their expectations being realized and, at that, not fully.

A new amendment to the Civil Practice Act prohibits the use in a civil action of any wire-tap evidence obtained in violation of section 738 of the Penal Law or without an *ex parte* order.[60] It also prohibits the admission of any evidence which is procured as a result of information obtained by an illegal wire tap. The law, however, allows an exception by providing that, "any such evidence shall be admissible in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government agency." The only quarrel with this law is that it is but half effective. It extends only to civil actions (and there with an exception) while making no mention of criminal actions. The law as outlined in the *McDonald* case must still control in criminal trials, and thus admit wire-tap evidence without regard to the legality of the wire tap. Such a position seems inconsistent. Would it not be more effective to let wire tappers know beforehand that in no case will the results of their illegal acts be allowed into evidence?

The Relationship Between the State and Federal Law

There remains one further problem in the field of wire tapping that involves

54. 302 U.S. 379 (1937).

55. 308 U.S. 321 (1939).

56. 8 Wigmore, Evidence § 2183 (3d ed. 1940); 1 Greenleaf, Evidence § 254a (15th ed. 1892).

57. People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903), aff'd, 192 U.S. 585 (1904).

58. 177 App. Div. 806, 165 N.Y. Supp. 41 (2d Dep't 1917).

59. 2 Rev. Record N.Y. Const. Con. 818-827 (1938).

60. N.Y. Civ. Prac. Act § 345-a.

the interrelation of federal and state law. Though New York has since 1938 sanctioned police wire tapping, there is considerable question as to the legality of the whole system. The question is fundamentally: how far does section 605 of the Federal Communications Act and the decisional law derived from it apply to the states? In *Harlem Check Cashing Co. v. Bell*[61] the New York Court of Appeals upheld the admission into evidence of information gathered in accordance with section 813-a of the Code of Criminal Procedure. In so doing, the court stated that section 605 of the Federal Communications Act was not intended as a check upon a state's police power. The New York system has not been authoritatively passed on by the United States Supreme Court although an evenly divided court considered the problem in *Stemmer v. New York*.[62] In that case wire-tap evidence was used to obtain a conviction for bribing athletes. The case went through the New York appellate courts, all affirming without opinion and merely citing the *Harlem Check Cashing* case.[63] The defendants claimed that the admission of wire-tap evidence in court violated section 605, and the United States Supreme Court divided four to four, thus affirming the decision of the New York Court of Appeals. There was no opinion in this case either. The *Stemmer* case, then, with its four to four affirmance does not seem to be conclusive of the problem. It has been argued that the federal statute governs not only the legality of state wire tapping, but also the admission in state courts of evidence secured either directly or indirectly by wire tapping. Section 605 says that "no person . . . shall intercept . . . and divulge . . . to any person . . . ," and it is not unreasonable to hold that this applies to the states.[64] If the statute is restricted to the exclusion of evidence in federal courts, the protection afforded against invasion of privacy all but vanishes, for the great majority of criminal prosecutions are tried in state courts. There is good reason to hold that the federal government has preempted the field, for when it is necessary to regulate interstate commerce effectively, Congress may regulate intrastate commerce.[65] Thus, in order to preserve the inviolability of interstate communications, Congress may regulate intrastate communications, and direct that no evidence gained from a wire tap be received in any court. In view of this it would not be straining the text to hold that section 605 of the Federal Communications Act applies to the states and prohibits even them from tapping wires and also bars the use of such evidence in state courts.

Though such an interpretation has considerable merit the United States Supreme Court has not approved it. The question actually is twofold: first, is it contrary to section 605 of the Federal Communications Act for a state to use wire taps; and, secondly, does it bar a state from accepting into evidence

61. 296 N.Y. 15, 68 N.E.2d 854 (1946).

62. 336 U.S. 963 (1949).

63. People v. Stemmer, 273 App. Div. 854, 77 N.Y.S.2d 261 (1st Dep't), aff'd, 298 N.Y. 728, 83 N.E.2d 141 (1948).

64. See Rosenzweig, supra note 47 at 77-80.

65. Wickard v. Filburn, 317 U.S. 111 (1942); Houston E. & W.T.R.R. v. United States, 234 U.S. 342 (1914).

matter that is gained by violating that statute? In the *Stemmer* case the Supreme Court approved the New York system, thus holding that section 605 did not bind them. For the reasons already given this does not seem conclusive authority. However, in regard to the second question there is little room for argument. The Court has held that section 605 does not bar the admission in a state court of evidence obtained in violation thereof. In *Schwartz v. Texas*,[66] the Court said, "We hold that section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof. . . ."[67] Whatever we may think of the rule, it seems to settle the question of evidence, but the legality of the New York system of supervised wire tapping can still be questioned.

In a recent case[68] the New York City Police obtained an *ex parte* order to wire tap the telephone of a bar which the defendant frequented. As a result of recordings thus made, the defendant was convicted of possessing alcohol without the tax stamp required by section 5008(b) of title 26 of the United States Code. Upon appeal the United States Court of Appeals affirmed the conviction, but Judge Medina in writing the opinion said, "despite the warrant issued by the New York State court . . . we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. . . . Section 605 of 47 U.S.C.A. is too explicit to warrant any other inference, and the *Weiss* case made its terms applicable to intrastate communications."[69] The case goes on, however, to explain that this does not necessarily mean that wire-tap evidence is inadmissible even if illegally obtained. The case may well prove to be significant for it is uncategorical in proclaiming the whole New York system illegal. Acceptance of this proposition by the United States Supreme Court would seemingly bring an end to police wire tapping in New York, but since the *Schwartz* case allows illegal wire taps to be admitted into evidence, one wonders how significant this would really be.

66. 344 U.S. 199 (1952)
67. Id. at 203.
68. United States v. Benanti, 244 F.2d 389 (2d Cir. 1957).
69. Id. at 391.