EAVESDROPPING: FOUR LEGAL ASPECTS

Was it such a dissolute speech telling of some Politicians who were wont to eavesdroppe in disguises, to say they were often lyable to a night walking cudgeller or the emptying of a Urinall?

MILTON: Apology against a Pamphlet (1642).

The term 'eavesdropping' includes wiretapping and the practice colourfully called 'bugging' in America. Wiretapping is simply the interception of communications passing over the telephone system, but 'bugging' covers the installation of every possible contrivance to transmit or record a conversation between persons.

The subject of wiretapping has come into prominence in Australia because of the passing of the Federal Telephonic Communications (Interception) Act 1960.[1] Some of the prominence is also due to the appearance in recent years of literature on the subject together with the reports of various commissions in the United Kingdom and America[2] set up to delve into this practice and recommend suitable legislative steps.

It is intended in this article to deal briefly with some of the legal aspects of eavesdropping. The ethical side of the subject is left to those more equipped to deal with it.

With scientific development the dangers of eavesdropping have increased. In early times persons could only listen to conversations in physically adjacent areas. Now telephone communications can be monitored, and the conversation of the living room can be transmitted to another by means of electronic equipment.

The matters in issue are whether the police authorities should be allowed to wiretap—should they be allowed to fight crime with the best possible equipment in the best possible way, or should the possibility of invasion of the privacy of innocent persons be avoided by total prohibition on police eavesdropping? Should the legislature intervene to prevent private citizens from concealing microphones, or would this be just another unwarranted intrusion into the liberty of the subject? The writings and case law on the subject abound with colourful phraseology. In a dissenting judgment, Brandeis J.

[1] Cth Act No. 27 of 1960.

[2] See Barry, 'An End to Privacy' (1960) 2 *M.U.L.R.* 443; Samuel Dash, Robert E. Knowlton and Richard F. Schwartz, *The Eavesdroppers* (Rutgers University Press, New Jersey, 1959); and 'Report of the Departmental Committee of Powers of Subpoena of Disciplinary Tribunals' [1960] Cmd 1033; 'Committee of Privy Councillors' [1957] Cmd 283; 'Report of the Californian Senate Judiciary Committee on the Interception of Messages by the Use of Electronic and other Devices' (1957).

once stated that 'discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet'.[3]

I. The Telephonic Communications (Interception) Act 1960

Broadly speaking, the scheme of this Commonwealth Act is a total prohibition on the interception of communications passing over the telephone, with two exceptions.

Interception of a communication consists of listening to, or recording, by any means, a communication in its passage over the telephone system without the knowledge of the person making the communication.[4] The accidental overhearing of a conversation due to a crossed line or other technical defect, or in the use of a party line or regularly installed extension telephone is excluded from the meaning of interception for the purposes of the Act.[5]

Section 5 (1) of the Act makes it an offence for a person to intercept, or to authorize, suffer or permit another person to intercept or to do anything that will enable him or another person to intercept a communication. The penalty provided is a fine of five hundred pounds or imprisonment for two years.

The first exception is that the offence of interception is not committed by an officer of the Postmaster-General's Department who, in the course of his duties, has to listen in, whether it be in the course of installation, operation or maintenance of the telephone system or in the course of tracing the origin of a call where, for example, a subscriber complains that some person is telephoning him and using indecent, abusive, or threatening language, or is otherwise contravening the provisions of the Post and Telegraph Act or of the Telephone Regulations.[6]

The second exception is interception in pursuance of a warrant[7] which issues only by two stated procedures. It is convenient to call these the 'normal' and the 'emergency' procedure respectively.

The normal procedure is as follows: the Director-General of Security may make a written request to the Attorney-General seeking a warrant to authorize the interception of communications passing over a specific telephone service. His requests must specify the facts and other grounds on which the Director-General of Security considers it necessary that the warrant should be issued.[8]

On receipt of such a request the Attorney-General is empowered to grant a warrant in respect of the prescribed telephone service only if he is satisfied that:

[3] *Olmstead v. U.S.* (1927) 277 U.S. 438, 473; 66 A.L.R. 376, 388. [4] S. 4 (1).
[5] Ss. 4 (2), 4 (3) *infra*. [6] S. 5 (2) (a). [7] S. 5 (2) (b). [8] S. 6 (2) (b).

. . . the telephone service is being or is likely to be—

(i) used by a person engaged in, or reasonably suspected by the Director-General of Security of being engaged in, or of being likely to engage in, activities prejudicial to the security of the Commonwealth; or

(ii) used for purposes prejudicial to the security of the Commonwealth. . . .[9]

The Attorney-General must also be satisfied that the interception would be useful to the security officials.[10]

The request for a warrant can be made and granted only if both officials believe that there is a danger to the security of the Commonwealth. Thus the broadness or narrowness of this power lies in the definition of this phrase. It is defined as:

> . . . the protection of the Commonwealth and the Territories of the Commonwealth from acts of espionage, sabotage, or subversion, whether directed from, or intended to be committed, within the Commonwealth or not.[11]

If the Attorney-General decides to grant the request, he is to inform the Director-General of Posts and Telegraphs, and to inform the Director-General of Security (and send the warrant itself to him).[12] The warrant must specify the period for which it is to remain in force: the maximum period is limited to six months.[13] Finally, even though the warrant is current it may be revoked at any time during the specified period by the Attorney-General,[14] or by the Director-General of Security if he is satisfied that the grounds on which the warrant was issued have ceased to exist.[15]

The difficulty with the procedure described above is that it is somewhat cumbersome. It can easily be imagined that an occasion will arise when a conversation will have to be monitored at a moment's notice to prove of any use at all. The problem here is how to draft a clause that gives a wide enough power to be useful and also a narrow enough procedure to prevent abuse of the power.

Section 7 sets out this emergency procedure. When the Director-General of Security has actually made a request to the Attorney-General for a warrant, and he is satisfied that the facts of the case would justify the issue of the warrant by the Attorney-General, and that, if interception does not commence before a warrant can be issued and made available by the Attorney-General, the security of the Commonwealth might be seriously prejudiced, he, the Director-General, may issue a warrant authorizing an interception. To this power there are a number of limitations. The first is that a request

[9] S. 6 (1) (a). [10] S. 6 (1) (b). [11] S. 3 (1). [12] S. 11 (1).
[13] S. 6 (4). [14] S. 6 (4). [15] S. 9.

for the warrant must have been actually made to the Attorney-General by the normal procedure. Secondly, the Attorney-General must have made no decision on that request. Thirdly, the Attorney-General must not have, within the preceding three months, refused a warrant in respect of that telephone service. Fourthly, the Director-General of Security himself must not have issued a warrant in respect of that telephone service during the preceding three months. Fifthly, the warrant must state the period for which it is to operate, but this must not exceed forty-eight hours.

Having issued the warrant, the Director-General of Security must furnish the Attorney-General with a copy and also a statement of the grounds on which he is satisfied that serious prejudice would or would be likely to result to the security of the Commonwealth unless interception took place before a warrant could be regularly issued.[16] The warrant can be revoked by the Attorney-General at any time during the forty-eight hours.

There is a sixth limitation to this emergency power following from the fourth. When the Attorney-General's warrant is issued by the normal procedure, it may be found that six months is not long enough. If so, then a new warrant may be issued in respect of the same service if the normal procedure is repeated. This, however, is not possible with the emergency warrant of the Director-General of Security—for he may not repeat his forty-eight hour warrant in respect of the same service until the end of three months from the issue of the first warrant.

Inevitably a certain amount of material will be intercepted that will have no bearing on security matters. The Act provides that such material must be destroyed.[17]

Thus Australia has an Act which limits the purpose for which a telephone may be tapped to circumstances where a telephone service is used, or is likely to be used, for purposes prejudicial to the security of the Commonwealth. The Australian Parliament has not followed the Committee of Privy Councillors, appointed to inquire into the interception of communications in October 1957,[18] who recommended that police and customs departments should also have the power.

Though the Act only purports to cover a very limited field of eavesdropping—the interception of telephonic communications—there are further limits in its coverage of this field that are imposed by the wording of the Act itself.

These intrinsic limits centre around the definition of interception and one of the two matters that are deemed not to constitute inter-

[16] S. 7 (3). [17] S. 10. [18] [1957] Cmd 283.

ception for the purposes of this Act. As stated previously, the Act defines interception (in section 4) as consisting 'of listening to or recording, by any means, such a communication *in its passing* over the telephone system without the knowledge of the person making the communication'.[19] The relevant excepting section is put in this form:

> Where a person lawfully on premises to which a telephone service is provided, by means of a telephone instrument or other device that is part of that service—
>
> (a) listens to or records a communication passing over a telephone line that is part of that service, being a communication that is being made to or from that service; or
>
> (b) listens to a communication passing over such a telephone as a result of a technical defect in the telephone system . . . ,
>
> the listening or recording does not, for the purposes of this Act, constitute the interception of the communication.[20]

It is necessary to consider what this section excludes from the operation of the Act. Will it cover the case where a microphone has been hidden in the wall of the victim's room and listeners are able to hear his side of the conversation over the telephone but not what the other party is saying?[21] Clearly the Act would not render such a practice illegal for there is in no sense an overhearing of the communication 'in its passage' over the telephone wires. The eavesdropper here would be in no different position to any individual who is present while another is speaking on the telephone.

Does the Act cover the situation where one of the parties to the conversation—a police informer for example—has given permission to a third person to attach a recorder to his telephone? Again there is no interception of a communication 'in its passage over the telephone system'. Such a situation would also probably be covered by section 4 (2).

Thus it appears that the Act has a geographical aspect to it—there is no interception within the meaning of the Act unless the message is overheard by means of a device fitted to the wire before it enters the receiver. This is a sensible result for it preserves as legal the three-sided telephone conversation which is fast becoming standard business practice. The Act, however, makes no distinction between an extension telephone regularly installed for general purposes and one that has been installed for the special purpose of listening to one or several conversations. Extensions for either purpose are both part of the telephone service for purpose of the definition section 3 (1).

[19] Italics supplied. [20] S. 4 (2).
[21] As was the situation in *Goldman v. U.S.* (1942) 316 U.S. 129.

Thus the Act leaves the parties to a phone conversation with no protection from the possibility of being overheard by means of an extension, and they must still determine what they can say safely in the light of this possibility. Further, apart from the use of an extension to overhear communications passing over the phone, the principal means of legally intercepting telephone calls lies in the twilight zone between wiretapping proper and 'bugging'.

Something now remains to be said on the subject of 'bugging' and the possibility of legislative intervention in this field. Most people realize that a certain amount of official wiretapping has gone on in the period since the war,[22] but to the suggestion that any 'bugging' has been practised in Australia most would answer that this is far too sophisticated a form of eavesdropping to be any part of the Australian way of life. Unfortunately there are no figures available for the Australian scene, and quite possibly no 'bugging' is practised; but if it is not, it is not for want of equipment. Tape recorders and microphones are readily available to the public—though perhaps the more refined apparatus is not as yet.[23]

The need for legislative intervention in this area (possibly before it even makes ground in Australia) can be shown by a few examples of gross invasions of privacy that are frequently noted in various American state reports. 'Bugging' apparatus could and has been placed in the rooms where prisoners confer with counsel about their defences; in cloakrooms in large factories so that the management can hear employees' comments; in 'private' rooms on used car yards where the salesman encourages married couples to discuss 'privately' what they want in the way of a car.

Because the present telephone system is restricted to actual lines, to draft an act to cover wiretapping is not so difficult a task, and, more important, it can remain adequate despite scientific development in this field. In the field of 'bugging', however, to draft an act would be an extremely difficult task because of the infinite number of ways now developed, and that will certainly be developed, of listening to private conversations.

Apart from these problems of scientific development, there are other more basic questions. Should a future act cover 'bugging' one's own premises? This is not as ridiculous as it may seem for the personal privacy of an individual can just as easily be abused when he is on the eavesdropper's premises as when he is on his own. Take the case

[22] Sir Garfield Barwick gave the figure of 182 telephone interceptions in the eleven years prior to 1960 in his Speech on the Second Reading of the Bill. See *Commonwealth Parliamentary Debates* [1960] 1425 (5 May).

[23] The intricate equipment available in America is described in the Report of the Californian Senate Judiciary—the most relevant portions of which are reproduced in (1960) 2 *M.U.L.R.* 449-451.

of the used car salesman above: having overheard what a married couple require in the way of a car, their financial position, *et cetera,* a salesman can make his 'attack' much more effectively. The clash here is between a man's entrenched right to use his premises as he wishes, and the right to personal privacy of those entering on to his premises at his invitation. Politically speaking, a bill to prevent a person 'bugging' his own premises would be a very difficult thing to pass, but if 'bugging' does gain ground in Australia some legislative action will have to be taken.

Perhaps future legislation could take an indirect approach and in some way control the sale of equipment suitable for 'sonic snooping'. This would mean that some kind of registration scheme would have to be devised to register the names of persons purchasing suitable equipment. Such a scheme could prove cumbersome and expensive. If a direct approach is to be adopted, then probably the best measure would be the requirement that a notice be placed on 'bugged' premises informing anyone concerned that conversations on the premises are liable to be monitored. The advantage of this would be that it would tend to invoke the assistance of those affected by the 'bugging' to ensure that the provision is respected.

In view of the limited legislative intervention in the field of eavesdropping as a whole, it may be worthwhile investigating the possibility of common law remedies in this field.

II. Criminal Remedies

As a result, probably, of the comparatively recent nature of serious eavesdropping, the criminal law seems ill-prepared to provide appropriate action. There is thus no recorded case of a conviction for eavesdropping either in England or Australia within the last 500 years. The possibility of binding over the eavesdropper to keep the peace has several times been asserted, but the indictability of the offence seems doubtful. The very lack of cases might well suggest that no such offence is known to the law. As for the modern writers in criminal law, only Russell[24] supports the existence of the crime. Notable amongst the older writers is Blackstone, who in a much-quoted passage says:

> Eavesdroppers or such as listen under walls or windows, or the eaves of a house, to hearken after discourse and thereupon to frame slanderous and mischievous tales are a common nuisance and presentable at the court-leet: or are indictable at the sessions and punishable by fine and finding securities for good behaviour. . . .[25]

[24] *Russell on Crime* (11th ed. 1958) ii, 1600.
[25] *Commentaries* (1771) iv, 168-169.

The only English case is as brief as it is ancient, and did not involve an indictment. Set out in full, the report reads: 'John Merygo, chaplain, is wont to listen by night under his neighbour's eaves, and is a common night-rover. . . .'[26] Conflict of opinion centres around the problem of whether the eavesdropper, who may be bound over under a statute of 1360[27] to keep the peace,[28] is also guilty of an indictable offence. Those who deny the indictability of the eavesdropper insist that the authorities (with the notable exception of Blackstone) refer merely to the Statute of 1360 authorizing the Justices of the Peace to 'take all of them that be [not][29] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people . . .'.[30] This procedure was held by Lord Goddard in *The King v. County of London Quarter Sessions Appeals Committee; ex parte Metropolitan Police Commissioner*[31] not to amount to a conviction. Strengthening his argument that the action in question had been under the 1360 statute, his Lordship asserted that it could not have been dealt with in any other manner: 'So far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping. . . .'[32] But it is to be noted that this statement was purely *obiter dictum* and that the other judges of the Court of Criminal Appeal (Atkinson and Humphreys JJ.) made no mention of the common law position, due to the fact that the charge was made expressly under the 1360 statute, and the words 'by eavesdropping', descriptive of the breach of the peace charged, had been expressly struck out of the charge by the Magistrate, so that the observations of Lord Goddard were clearly in no way relevant to the case in hand.

Not only has the authority of Lord Goddard's statement been challenged, but also its validity. Russell quotes a Scottish case[33] involving a 'peeping tom', the usual counterpart of the eavesdropper, but it is by no means clear that that case supports the indictability of the offence. Reference is also made to *Hawkins' Pleas of the Crown*[34] but once again the discussion of eavesdroppers there contained occurs in the context of the Statute of 1360. On the other

[26] Leet Roll of 14 Richard II (1390) in *Selden Society* v, (1892), 70 (Leet Jurisdiction in Norwich).

[27] 34 Edw. 3, c. 1 (Eng.); see Imperial Acts Application Act 1958, Part II, Division 14.

[28] See, for example: Blackstone *loc. cit.; Hawkins' Pleas of the Crown* (3rd ed. 1734), Ch. 62; William Sheppard, *The Court Keeper's Guide* (1649), 47-49.

[29] Authorities differ as to the exact text of the statute: see *Lansbury v. Riley* [1914] 3 K.B. 229, 236. In Victoria the text is as printed in the Imperial Acts Application Act, *loc. cit.*

[30] 34 Edw. 3, c. 1 (Eng.). [31] [1948] 1 K.B. 670. [32] *Ibid.* 675.

[33] *Raffaelli v. Healy* [1949] S.C. (J.) 101; *Russell op. cit.* 1600.

[34] *Ibid.* Ch. 62, s. 4.

hand it is clear that Blackstone saw no such limitation, for he expressly suggested that they might be 'indictable at the sessions . . .'.[35] This conflict has been noted by the Supreme Court of Victoria which has rather pointedly left the issue open. In *Haisman v. Smelcher*,[36] Barry J., speaking for the Full Court, pointed out that the observations of Lord Goddard C.J. in *Rex v. County of London Quarter Sessions Appeals Committee*[37] 'do not seem to accord with Blackstone's statement . . .'.[38]

However, despite the doubts as to the validity of Lord Goddard's view implicit in the attitude of the Full Court, it does seem that in the absence of further material it would be difficult to reach any definite conclusion, beyond mere speculation, as to the availability of indictment as a means of dealing with the eavesdropper at common law. The 1390 case referred to,[39] although unclear, seems probably to have been based on the Statute of 1360,[40] the procedure being by presentment in the court leet followed by binding over by the Justice of the Peace. This is described by William Sheppard in his *Court Keeper's Guide* as follows:

> The steward of a court leet in charging the jury was wont to charge them: 'You shall inquire of and present . . . the evesdropper, i.e. he that doth hearken under windows and the like, to heare and tell newes to breed debate between neighbours . . . all these may be amerced, and be bound to the good behaviour by a justice of the peace.[41]

It seems therefore that the only established way of dealing with the eavesdropper is by way of binding over under the Statute of 1360,[42] as described. But, based as it is on the notion of a breach of the peace, this remedy does not seem appropriate to the case of the modern eavesdropper who hides his microphones, and for whom the very basis of his act is the secrecy with which he performs it. This inadequacy is, in the English and Australian jurisdictions, directly bound up with the nature of the remedy, but it is interesting to note that the same basic concepts persist in those American jurisdictions which have treated eavesdropping as a separate indictable common law offence. This gives the impression that even were it possible to persuade a court of the existence of such a separate offence in Australia, its nature might well be so tied to the old concepts of public nuisance as to render it ineffective to deal with the modern electronic eavesdropper. Wharton describes the offence thus: 'Eavesdropping may be indictable as a nuisance . . .',[43] and Bishop says: 'it consists

[35] *Commentaries, loc. cit.* [36] [1953] V.L.R. 625. [37] [1948] 1 K.B. 671, 675.
[38] [1953] V.L.R. 625, 627. [39] *John Merygo's* case, *supra.*
[40] 34 Edw. 3, c. 1 (Eng.).
[41] Pp. 47-49; quoted by Rich J. in *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479, 503. [42] 34 Edw. 3, c. 1 (Eng.).
[43] Anderson, *Wharton's Criminal Law and Procedure* (1957) ii, 696.

in the nuisance of hanging about the dwelling house of another, hearing tattle, and repeating it to the disturbance of the neighbourhood'.[44] The basic definition adopted in the American cases has been that of Blackstone,[45] and the preoccupation with nuisance as the basis culminated in a claim by Wharton that the offence must be habitual. This was legally adopted in North Carolina in *State v. Davis*[46] where an indictment failed because it did not allege repetition of the offence.

With the law in this state it seems, first, that eavesdropping is not indictable as a separate common law offence, and secondly, that even were the courts to treat it as being indictable, its very nature would still be such as to make it practically useless. In so far as there are no English cases on the subject it might be argued that if a court were to treat the offence as being indictable, it might equally define it as it wished. But the American cases, and also the definition given by Blackstone, do tend to show that at the basis of the offence of eavesdropping is the concept of public nuisance, and this seems inappropriate in dealing with the modern eavesdropper. It therefore seems safe to conclude that the limitation of the Act to telephone tapping leaves large areas of the field untouched by the law.

III. Admissibility of Evidence Illegally Obtained

With the growth of the practice of eavesdropping a problem will arise in Australia as to whether evidence obtained in contravention of the Telephonic Communications (Interception) Act and evidence obtained by 'bugging' (when the placing of the 'bugging' equipment on the relevant premises constitutes a trespass), is admissible. Often information obtained by eavesdropping would only be used as a 'lead' to gain other evidence by normal methods, but cases will arise here, and have arisen in other countries, when no other evidence, but that illegally obtained, is available. What, then, is the position of illegally obtained evidence as far as Australian law is concerned? This point seems to have been settled by the recent decision of the Privy Council in *Kuruma v. The Queen*[47] in which the Judicial Committee advised that:

> In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained.[48]

[44] Bishop, *New Criminal Law* ii, 274.
[45] *E.g. State v. Davis* (1905) 111 A.S.R. 816; 51 S.E. 897; *State v. Pennington* (1859) 3 Head 299; 75 Am. Dec. 771.
[46] (1905) 111 A.S.R. 816.
[47] [1955] A.C. 197.
[48] *Ibid.* 203.

This attitude seems clear and accords with the views of Canadian courts,[49] though in direct contrast to the Scottish law. Only one concession was made by their Lordships:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. . . . If, for instance, some admission of some piece of evidence . . . had been obtained . . . by a trick. . . .[50]

Two things are notable about this concession. First, the reliance by their Lordships on *Noor Mohamed v. The King*.[51] That case involved a discussion of the law relating to 'similar act' evidence, and the statement of the principle in question was there limited to 'such cases'.[52] The Privy Council in *Kuruma's* case have treated it as involving a general principle, thereby considerably extending its original scope. Secondly, of interest is the introduction of the notion of *unfairness* into a field where by normal standards any admission of illegally obtained evidence would be unfair. It seems clear from the way in which their Lordships exemplified the idea of unfairness by reference to a 'trick'[53] that they had in mind some positive deception of a kind rather different from the unfairness associated with illegal eavesdropping. This being so, it would seem that, as the law now stands, the basal principle remains that all relevant evidence is admissible regardless of how it was obtained.

It is pertinent to ask whether this is a good and worthwhile principle, with a view to deciding whether the Act should have denied the principle application to eavesdroppers. Basically, the conflict is between those who say that the past history of how evidence was gathered is quite irrelevant to its veracity and hence to questions of admissibility, and those who contend that so long as the police are able to use illegally obtained evidence in court, they will continue to use illegal methods to obtain it. This matter has been a great deal debated in the United States where the issues are involved with a number of constitutional disputes inapplicable to Australia. But these authorities raise arguments quite apart from the constitutional matters, and it seems that the dismissal of American cases in *Kuruma's* case was rather too hasty. The difficulty in reconciling the two points of view has been described by one American writer thus: 'It is not a choice between a good principle and a bad principle but between two good principles, and the problem is to strike a balance.'[54]

[49] For a discussion of the authorities on this point by Cowen and Carter, *Essays on the Law of Evidence* (1956), Essay iii: 'Admissibility of Evidence Procured through Illegal Searches and Seizures', 93 ff.

[50] [1955] A.C. 197, 204.

[51] [1949] A.C. 182.

[52] *Ibid.* 192.

[53] [1955] A.C. 197, 204.

[54] William T. Plumb Jnr., 'Illegal Enforcement of the Law' (1939) 24 *Cornell Law Quarterly* 337, 370.

For a long time, those who argued for exclusion were continually met with the argument that they were unable to show that an alteration in the rules of admissibility would in fact be reflected in a lessening of the amount of illegal wiretapping in practice. The only answer to this was that of the writer who said: 'The efficacy of few, if any, of our legal rules or methods has been scientifically demonstrated. Lawyers, judges and writers have been content with discussing the advisability of rules from the standpoint of tendencies rather than certainties of effect.'[55] This was recognized by the exclusionists as a weak rejoinder, but a recent Californian decision has lent force to their arguments. *People v. Cahan*[56] was a decision of the Californian Supreme Court, delivered in 1955 (too late to influence the Privy Council in *Kuruma's* case), in which it was decided by the majority that as a matter of policy the old rules of admissibility worked unjustly and allowed too much illegality, and therefore that an exclusionary principle should be adopted. It was felt that in no other way could the law sufficiently curb the illegal activities of the police.

The main argument for admitting the evidence is simply that the way in which it is gathered is a matter quite irrelevant to its admission, which should be governed by the twin principles of relevance and veracity. As counsel for the defence remarked in Bishop Atterbury's trial: 'Are the letters less criminal, if the person who stopped them did not punctually pursue the directions of that Statute?'[57] Notable among the exponents of this view is Wigmore.[58] He takes the view that as a method of punishing the officer who obtained the evidence illegally it is quite irrelevant to the main issue, and that it is fundamental that such incidental matters as this should not be discussed in a court constituted to try a different issue. But it is submitted that this attitude begs the main questions. For all matters relevant to admissibility may be discussed, and equally, there are cases where evidence is excluded on grounds of public policy even though it is quite clearly both relevant and accurate (for example, evidence of prior convictions). As a consequence of this, it is wholly misleading to suggest that merely because evidence is true and relevant it is admissible, and that all other discussion is merely confusing and irrelevant. It may be that there are grounds of public policy for excluding the evidence, and if so, the history of its collection will be relevant to determine admissibility. Truth is not the sole criterion of admissibility. Knight Bruce V.-C. said in *Pearse v.*

[55] Thomas E. Atkinson, 'Admissibility of Evidence Obtained through Unreasonable Searches and Seizures' (1925) 25 *Columbia Law Review* 11, 25.

[56] 282 P. 2d 905; 50 A.L.R. 2d 513.

[57] (1723) 16 *Howell State Trials* 323, 630.

[58] *Evidence* (3rd ed. 1940), s. 2183.

Pearse:[59] 'Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much'.[60]

Those in favour of admission claim that so far as the wrong done is concerned, the exclusion of evidence is wholly unjustified as affording recompense or protection to the defendant. For if he is innocent, he has nothing to hide, and exclusion of the evidence in no way ameliorates the wrong he has suffered, whereas if he is guilty, then he is not to be protected. Logically the defendant should be punished for his crime, albeit a wrongfully discovered one, and so too the officer should be punished for his breach of the law. Under the exclusionary rule, it is argued, 'the criminal is to go free because the constable has blundered'.[61] But this argument only has application where the evidence might equally have been obtained by legal means, where the illegality arose in the course of a police short-cut, as it were. In those cases—and it is submitted that they would make up the vast majority—where the evidence could not have been legally obtained, then exclusion does no more than put the criminal in the position that he would have been in, had the law been obeyed. It may be quite true that so far as the wrong done is concerned, exclusion benefits only the guilty man, but the most powerful argument in favour of exclusion is that if the fruits of illegality are made less sweet, then there will be general public protection.

Not only does it seem necessary to exclude such evidence in order to reduce the temptation to illegality, but also to protect the courts from the appearance of sanctioning it. It is no answer to suggest that a distinction should be drawn between the government acting as law enforcer and the government acting as judge. As Oliver Wendell Holmes has said:

> no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities. . . .[62]

Even if it could be shown that exclusion would in no way help to prevent wiretapping, even if strict logic seemed to support conviction of both the wrongdoer and the wiretapper, the court should maintain its moral integrity by exclusion of the evidence. The 'clean hands' argument of equity has two branches: First, that in dealing with the relations *inter partes* equity would not help someone who would not himself 'do equity'. Secondly, that the courts of Chancery refused to soil their own hands by helping anyone who was himself

[59] (1846) 1 De G. & S. 12.
[60] *Ibid.* 28-29.
[61] *People v. Defore* (1926) 150 N.E. 585, 587, *per* Cardozo J.
[62] *Olmstead v. United States* (1927) 277 U.S. 438, 470.

a wrongdoer. This second branch applies to the case in issue. In *People v. Cahan,* Traynor J. said:[63]

> . . . any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system. . . . In a government of laws, existence of the government will be imperilled if it fails to observe the law. . . . Crime is contagious.[64]

It would be destructive of the whole system of law to say that the end justifies the means. Oliver Wendell Holmes has stated: 'The law can ask no better justification than the deepest instincts of man.'[65] It is not an idea based upon sentiment, rather it is necessary in order that the popular respect for the courts of law should be maintained.

In the case of civil suits the rule stated in *Kuruma's* case has long been established,[66] and in that case the Judicial Committee of Privy Council advised that: 'there can be no difference in principle for this purpose between a civil and a criminal case'.[67] It is interesting that their Lordships should have been prepared so readily to deny any difference of principle. The first branch of Equity's 'clean hands' doctrine[68] is inappropriate in criminal matters, in that while *formally* the trial may be contended between the Crown and the accused, in fact the Crown represents more than its own interests. Public interest would be served ill if the accused were to go free merely because the Crown had, by its agents, 'soiled its hands'.[69] But in civil cases both branches of the doctrine seem apposite, both in so far as it relates to the dispute *inter partes* and also to the courts keeping their own hands clean. One might therefore expect evidence to be less readily accepted in civil than in criminal cases, though in civil cases the public policy arguments tend to weigh less heavily because less often is the tapping in these cases done by official bodies. But to whatever conclusion the argument may lead, the law is well settled, and it is submitted that the Act might well have effected some kind of rejection of the *Kuruma* principle so far as wiretapping is concerned.

IV. Civil Remedies of the Victim of Eavesdropping

The eavesdropper has many and varied methods of 'tapping' what is said on another's premises. Some of these ways involve entering on to the victim's premises, and some do not. The question arises of the rights, if any, of a person to the seclusion of his land, and of the

[63] (1955) 282 P. 2d 905. [64] *Ibid* 912.
[65] *Collected Legal Papers* (1920) 200.
[66] *Lloyd v. Mostyn* (1842) 10 M. & W. 478, 481.
[67] [1955] A.C. 197, 204. [68] *Vide supra.*
[69] To this extent the remark of Cardozo J. in *People v. Defore* (1926) 150 N.E. 585, 587, that 'the criminal is to go free because the constable has blundered' has application.

methods he might have to prevent such an invasion of his privacy. An additional question is the availability of remedies to the victim of such an invasion.

When the eavesdropper has entered on to the complainant's premises the law of trespass will be of some assistance. When a private person enters on to the premises of another without permission and conceals a microphone or tape recorder, then already an action for trespass to land would lie. The owner of the premises could be entitled to exemplary damages awarded for trespass committed under circumstances which show a wanton invasion of privacy or disregard for the plaintiff's rights to property.[70] This supposition is also supported by the example Gibbs C.J. gives in *Merest v. Harvey*[71] As a clear case for the award of exemplary damages. The example is worth quoting in full for it deals with the visual counterpart of eavesdropping in the field on invasion of privacy:

> Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "here is a halfpenny for you, which is the full extent of all the mischief I have done"? Would that be a compensation? I cannot say that it would be.[72]

This same elementary law would cover the case of officials entering on to land without authority. A problem arises in the situation which would be the more normal one: when there is some authority in the form of a search warrant, *et cetera,* for the original entry, but where this entry is used for the concealing of 'bugging' apparatus without the knowledge of the occupier of the premises. What remedy would the occupier of the premises have to compensate him for this underhand invasion of his privacy? Such a fact situation immediately brings to mind the anomalous doctrine of trespass *ab initio* and its use to find remedies for excesses of authority.[73] It has been stated: 'when an entry, authority, or licence is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio* . . .'.[74]

This rule was procedural in origin but it had a secondary effect upon substantive law, and this effect still remains: it enables the plaintiff to recover damages for the entire transaction and not merely for the wrongful portion of it.[75] Thus the rule means that when there is an initial entry by authority of law and a subsequent abuse of that authority to enter, the legal immunity of the initial entry is lost.

[70] *Clerk & Lindsell on Torts* (11th ed. 1954) 545.
[71] (1814) 5 Taunt. 442.
[72] *Ibid.* 443.
[73] Holdsworth, *A History of English Law* (1925) vii, 498-501.
[74] *The Six Carpenters' Case* (1610) 8 Co. Rep. 146a.
[75] *Oxley v. Watts* (1785) 1 T.R. 12.

The rule is not without limitations. In the situation suggested above the first two limitations are complied with: there is an entry under authority of law, *viz* the search warrant, *et cetera,* and there is a positive abuse of the authority, *viz* the concealment of the 'bugging' apparatus. The third limitation is well stated by Salmond:

> A lawful entry does not become by abuse a trespass *ab initio,* unless that abuse has reference to and so takes away the entire ground and reason of the entry. If there remains any independent ground or reason of entry, which is unaffected by the abuse, it will suffice to justify the entry and protect it from the rule of trespass *ab initio.*[76]

Thus it can be seen that question of whether an action of trespass *ab initio* will lie in a case of unauthorized 'bugging' can be answered only on the facts of each case as it arises—that is on the answer to question of whether the entry under a search warrant, *et cetera,* is a complete sham to cover the concealment of 'bugging' apparatus, or whether the action authorized was the substantial reason for the entry and the concealment of a 'bugging' device merely incidental to this.

When an individual is the subject of eavesdropping, whether official or private, in a form that does not involve entry on to his land, then his position is difficult. If it is illegal wiretapping, then the Act covers him and he only need report the breach of the legislation. When the form of the eavesdropping complained of is 'bugging' by means of an instrument that is not situated on his premises, for example, a 'shot-gun' microphone, then his redress depends on the existence of some kind of law of privacy. The problem resolves itself into the question of how far can one person restrain another from invading the privacy of land which he occupies, when such invasion does not involve actual entry on the land.

This question has been posed and answered at various stages over the last fifty years.[77] These writings consider whether or not a separate right to privacy, as such, is protected by law. In Australia this is now settled: the High Court of Australia has stated in *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor*[78] that no general right of privacy exists. The case was one dealing with the visual counterpart of eavesdropping in the sphere of invasion of privacy, and consisted of an action for an injunction to restrain an observer from broadcasting a commentary of races held on the plaintiff's land

[76] *Salmond on Torts* (12th ed. 1957) 170. This third limitation was sired by a *dictum* by Lord Holt in *Dod v. Monger* (1704) 6 Mod. 215; given the force of a decision in *Harvey v. Pocock* (1843) 11 M. & W. 740, and followed in *Canadian Pacific Wine Co. Ltd v. Tuley* [1921] 2 A.C. 417; *Elias v. Pasmore* [1934] 2 K.B. 164.

[77] See Warren and Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193; Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

[78] (1937) 58 C.L.R. 479.

from a tower erected on an adjoining block of land. The request for an injunction was based, *inter alia,* on the law of nuisance and on the ground that there was an interference with the plaintiff's proprietary right in the spectacle conducted on his land. The injunction was refused on the former ground since there was no interference in any way with the use and enjoyment of the plaintiff's land. The only effect of the defendant's action was a loss of profits through the public listening to a broadcasted commentary instead of paying for admittance to the plaintiff's land to see the spectacle. As to the latter ground, Dixon J. stated: 'It is not a natural right for breach of which a legal remedy is given, either by an action in the nature of nuisance or, otherwise.'[79] Latham C.J. concurred: 'no authority was cited which shows that any general right of privacy exists'.[80]

Thus the common law appears to possess no direct remedy for the person whose privacy has been invaded by an eavesdropper who does not break the victim's close. If the victim's close is broken, trespass would normally be available. Otherwise the victim must rely on established heads of recovery: the more important being nuisance and defamation. An action for defamation would lie if the information gained by the eavesdropping was used in such a way as to come within the scope of that tort. An action for nuisance will lie if the effect of the eavesdropping is felt on the land, and substantially retards the victim's use of his premises. Systematic 'watching and besitting' calculated to interfere with reasonable enjoyment of premises has been held to be an actionable nuisance,[81] and it could be that systematic eavesdropping would also be actionable, for such eavesdropping could interfere with the natural use of land, in that it could prevent the occupant from speaking freely. Exemplary damages can be awarded to the victim of an eavesdropper to compensate him for the real wrong suffered only after he has proved that a common law tort of this nature has been committed.

Thus, it can be said the Telephonic Communications (Interception) Act 1960 covers adequately the field intended, though there do remain important aspects of wiretapping which could be the subject of later statutory enactment, both State and Federal.

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[79] *Ibid.* 508.
[80] *Ibid.* 496.
[81] *Lyons & Sons v. Wilkins* [1899] 1 Ch. 255.