COMMENT.

The so called "anti-scalper" law of New York has recently been declared by the Court of Appeals of that state to be unconstitutional. (*People ex rel. Tyroler* v. *Warden of City Prison of City of New York*, 51 N. E. Rep. 1006.) This opinion reverses that of the Supreme Court, Appellate Division, in which the law was upheld (50 N. Y. Sup. 56). The law in question was that prohibiting the sale of railway passage tickets by persons not agents of the carrier (Laws 1897, c. 506, § 1), and (§ 2) authorizing an agent of any transportation company to purchase from the agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of a line of which he is agent, so as to enable such passenger to travel to the place from which his ticket reads. The chief ground of the decision was that the law was in conflict with Const., art. 1, § 6, providing that no person shall be deprived of liberty without due process of law, the court holding that the buying and selling of such passage tickets was a legitimate business, and to prevent one from engaging in it while others were allowed the privilege, was depriving of liberty within its provisions. Chief Justice Parker, in delivering the opinion of the court, said: "The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. * * * It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets, and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from non-law-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon appointing power, nor upon the agents selected, other than that, in the purchase of tickets, he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony." The court also holds that the sale of a valid passenger ticket by a broker is not a fraud, on either the transportation company or the traveler, calling for protective legislation in the exercise of the police powers; that such an act is not valid as a police regulation of carriers as quasi public corporations, nor as a police regulation of the manner in which the business of ticket brokerage may be conducted; that in determining whether a law attempted to be justified as being within the police power is in violation of the constitution, the courts must ascertain whether the health, morals, safety, and welfare of the public justified the enactment; that the legislature was not justified in depriving every citizen of the liberty of engaging in the ticket-brokerage business, from the fact that some dishonest persons have engaged in the business who have perpetrated frauds upon both travelers and transportation companies alike; that the act could not be

justified on the ground that such legislation is for the public good because it enabled transportation companies to compel others with which they had entered into pooling arrangements to preserve their agreement from secret violation by selling a block of tickets to a ticket-broker at less than the usual price and thus take travel from their competitors. Justices Bartlett, Martin and Gray dissented. Justices Bartlett and Martin both wrote dissenting opinons, after reading which one cannot refrain from a doubt as to the correctness of the prevailing opinion. It certainly is not in accord with some courts on the point. (*State* v. *Corbett*, 57 Minn. 345, 59 N. W. 317; *Railway Co.* v. *McConnell*, 82 Fed. 65.)

The Supreme Court of New York, in the case of *People ex rel. MacDonald* v. *Leubuscher*, 54 N. Y. Sup. 869, has recently held, in affirmance of the lower court, that a notary public, acting under a commission issued out of another state appointing him a commissioner to take testimony in a certain case there pending, could not commit for contempt of court, one summoned to appear before him and give testimony and who refused, on advice of counsel, to answer the questions, or a part of them; and that § 921 of the Code of Civil Procedure, giving a notary public power to confine a witness until he answered such questions, to be unconstitutional as depriving the witness of his liberty without due process of law. All the judges (Barrett, J., dissenting) wrote opinions in affirmance of the opinion of the court. The main question discussed was one as to due process of law: whether or not an individual, not connected in any way with the administration of justice in the state, and who had no judicial power invested in him by the Constitution or the Legislature, nor was connected in any way with any of the courts or bodies in whom the judicial power is vested, could be authorized by the Legislature to issue process, which would be deemed due process of law, by which an individual might be deprived of his liberty. This they held in the negative. Ingraham, J., in delivering the prevailing opinion, said: "It can hardly be claimed that this 'commissioner and notary public' is connected with the judicial department of the government of this state. He does not act by virtue of his holding the office of notary public within this state. The addition of that title to his name is merely *descriptio personæ*. He is not appointed by any state authority, but is appointed by the court of a foreign state. He may as well be a citizen of the foreign state, owing it allegience. He receives no compensation for his services from the state or under the laws of this state. He is not under the control of any of the officers or departments of the state government. He cannot be punished for an abuse of his power by this state. No appeal from his decision can be taken to any of the courts of this state. He acts without responsibility to any official or department of the state government, and while he does not formally adjudge a person whom he has determined to imprison in contempt under his warrant, uncontrolled by those officers selected by the people to administer the judicial power of the state, his mandate takes from a citizen of this state his liberty, and from that mandate the citizen has no appeal." It was further pointed out by Rumsey, J., that before the witness could be committed there must be a determination of the question whether the question put was material and proper. (*Matter of Searle* 155 *N. Y.* 333, 340.) That determination lies at the foundation of the power to commit. Until that is made the witness cannot be compelled to answer, nor can he be committed for refusal to answer, unless that conclusion has been reached by the commissioner. But this determination is a question of law—one necessarily judicial in nature—and which, in the court's opinion, the "notary" could not validly determine, because in no sense a judicial officer.