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Constitutional Law—Admission of Evidence Obtained by Use of Stomach Pump Violative of Due Process

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enter a bill of specific performance that would force upon Bronx a title that was defective; similarly, it would be inequitable to enter a bill that would deny to the Railroad full performance of its contract with Bronx.

In conclusion, it is submitted that the New York Court in the instant case has reached a correct result, but that the Court's reasoning, insofar as it departs from traditional contract theory, by implying that a sub-vendee may sue directly against the original vendor on an agreement to which the sub-vendee was not a party, is erroneous.

Robert Schaus

CONSTITUTIONAL LAW—ADMISSION OF EVIDENCE OBTAINED BY USE
OF STOMACH PUMP VIOLATIVE OF DUE PROCESS

A stomach pump and emetics were used to forcibly extract two morphine capsules from the stomach of a narcotics suspect. These capsules were used as evidence to obtain a state conviction for the violation of the California Health and Safety Code, 1947, Section 11500, which makes the possession of narcotics illegal. The conviction was reversed by the United States Supreme Court on the grounds that it had been obtained by methods that "offend the due process clause of the Fourteenth Amendment." JJ Black and Douglas concurred in the result, but propounded the argument that the privilege against self-incrimination which is binding on the federal courts through the Fifth Amendment also extends to the state courts through the Fourteenth Amendment due process clause, and that specifically, the suspect had been forced to incriminate himself by the described extraction and use of the morphine capsules. *Rochin v. People of California*, 72 S. Ct. 205 (1952).

Had this case arisen in the federal courts, the defendant would have had two possible constitutional defenses, viz.: that the evidence was obtained through an illegal search and seizure which is forbidden by the Fourth Amendment, *McNabb v. U. S.*, 318 U. S. 332 (1943); *Jeffers v. U. S.*, 72 S. Ct. 93 (1951); and that the forcible extraction of the capsules offended the defendant's privilege against self-incrimination guaranteed by the Fifth Amendment, *Smith v. U. S.*, 337 U. S. 137 (1949). These defenses, however, are not guaranteed by the Federal Constitution in a state prosecution. In *Wolf v. Colorado*, 338 U. S. 25, 33 (1949) where a conviction for criminal abortion was obtained through the use of records taken from a doctor's office without a search warrant, it was held that "in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure;" and in *Twining v. New Jersey*, 211 U. S. 78, 91-99 (1908), the

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power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the due process clause of the Fourteenth Amendment, and that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state."

It should be noted that at the present time eighteen states apply the so-called federal exclusion rule as regards evidence illegally obtained, 150 ALR. 566 (1944), and that all of the states guarantee the privilege against self-incrimination, forty-six by constitutional or statutory provision and the other two by virtue of judicial decisions. E. M. Morgan, *Self-Incrimination*, 34 Minn. L. Rev. 1 (1951). California extends this privilege by statute. Penal Code of California, Section 1323.

It has been held that the due process clause does not include the entire Bill of Rights. *Adamson v. California*, 332 U. S. 46 (1946); 2 Stanford Law Review, 5, 140 (1949). See further *Barron v. Baltimore*, 7 Pet. 243 (1833). Guarantees of the Bill of Rights which have been held included in the due process clause of the Fourteenth Amendment are: freedom of the press, *Grosjean v. American Press Co.*, 297 U. S. 233 (1935), *Near v. Minnesota*, 283 U. S. 697 (1930); freedom of speech, *DeJonge v. Oregon*, 299 U. S. 353 (1936); freedom of religion, *Hamilton v. Board of Regents*, 293 U. S. 245 (1934); and freedom of assembly, *DeJonge v. Oregon*, *supra*. Those guarantees of the Bill of Rights which have been held not to be a part of the due process clause of the Fourteenth Amendment are: double jeopardy, *Palko v. Connecticut*, 302 U. S. 319 (1937); grand jury indictment, *Hurtado v. California*, 110 U. S. 516 (1883); indictment and trial by jury, *Maxwell v. Dow*, 176 U. S. 581 (1889); and, in point with the instant case, the privilege against self-incrimination, *Twining v. New Jersey*, *supra*, and *Adamson v. California*, *supra*.

In the instant case the Court's refusal to accept the theory expounded by JJ Black and Douglas that the conviction here should have been reversed on the grounds that the due process clause of the Fourteenth Amendment includes the privilege against self-incrimination appears quite sound. The fact that exemption from self-incrimination is specifically enumerated in the guarantees of the Fifth Amendment tends to show that it was and is to be regarded as a separate right and not an element of due process of law. *Twining v. New Jersey*, *supra*, p 106. The framers of the Constitution did not intend to be redundant.

If the privilege against self-incrimination was held includable in the Fourteenth Amendment due process clause, there would be the further practical difficulty of determining what is self-incrimination. See E. M. Morgan, *op. cit.* The state and federal courts are not in complete agreement as to what facts constitute self-incrimination. What an accused person can be compelled to do is one of the most controversial issues of constitutional law and criminal law, See E. M. Morgan,

op. cit. pp 38-39. For a study of the areas of conflict and conflicting court attitudes and decisions, see Inbau, *Self-Incrimination*, (1950).

The majority of the Court properly reaffirmed the *Adamson* doctrine, *supra*, pp 50-51, that "it is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights." In view of the fact that the privilege against self-incrimination and freedom from an illegal search and seizure are not applicable to the states through the Fourteenth Amendment, the majority of the Court in order to overthrow the state court conviction had to find that the acts complained of were a denial of due process of law in that they violated, as Mr. Justice Cardozo said in *Palko v. Connecticut*, *supra*, p 328 "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

In cases where the defendant was denied counsel in a trial involving capital punishment, *Powell v. Alabama*, 287 U. S. 45 (1932); where the defendant's confession was coerced, *Watts v. State of Indiana* 338 U. S. 49 (1949); where the defendant was denied a fair trial due to the lack of an impartial judge, *Tumey v. State of Ohio*, 273 U. S. 510 (1927); and where the trial was dominated by a mob, *Moore v. Dempsey*, 261 U. S. 86 (1923), the convictions were reversed because there had been a denial of due process of law. The instant case is a further illustration that it is a denial of due process of law when in the administration of criminal justice the means of obtaining a conviction are so revolting as to shock our fundamental concepts of justice and ordered liberty.

Joseph A. Taddeo

EQUITY: THE CLEAN HANDS MAXIM AND THE NEW

FEDERAL GAMBLER'S TAX

As a gambler, petitioner was subject to Chapter 27A of the Internal Revenue Code, (Int. Rev. Code, Sec. 471), imposing a ten per cent excise tax on all wagers, and an occupational stamp tax of fifty dollars on all persons subject to the excise tax. Failure to acquire the stamp exposes the violator of the Act to criminal penalties. Petitioner declined to make some of the required disclosures, and so was unable to acquire the stamp. He subsequently brought an action against the Sec'y. of the Treasury, claiming that the act was violative of the Federal Constitution, (U. S. Const. Art 1, Sec. 8; and Amend. V), in that the Act