CASE NOTES

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES — REASONABLENESS OF GOVERNMENT'S SEARCH OF DEFENDANT'S BODY

The defendant who was suspected of unlawfully concealing narcotics was arrested by federal officers. Having admitted that he had secreted narcotics in a bodily cavity, he was taken to a physician who under sanitary conditions conducted a routine examination and with the use of medically approved procedures removed narcotics from the rectum of defendant without his consent. In the trial court the defendant objected to the admissibility of the evidence on the grounds that it was obtained by means of an unreasonable search and seizure prohibited by the Fourth Amendment to the United States Constitution. The trial court overruled the objection and defendant appealed. *Held*: Affirmed. Government physician's forcible removal from defendant's rectum of narcotics which he had admittedly secreted there, is not violative of the Fourth Amendment as an unreasonable search and seizure. *Blackford v. United States,* 247 F.2d 745 (9th Cir. 1957).

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated." U. S. CONST. amend. IV. Historically this amendment was largely directed against exploratory domiciliary searches that had been conducted by British and Colonial governments. *United States v. Smith,* 68 F. Supp. 737 (D.C. 1946). The Supreme Court, however, early extended the effect of this amendment to afford protection to the individual defendant in a criminal action in a federal court in determining that evidence obtained by means of an unreasonable search and seizure by federal officers was privileged to the defendant and, accordingly, not admissible in federal courts, *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed. 746 (1886); this federal rule of exclusion being subject to the limitation that the defendant must make the proper objection to its admissibility at the proper time. *Weeks v. United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L.Ed. 652 (1914). While the amendment should be construed liberally to safeguard the right of privacy, *United States v. Lefkovitz,* 285 U. S. 452, S. Ct. 420, 76 L.Ed. 877 (1932), it is only unreasonable searches and seizures which come within this constitutional interdict. *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L.Ed

1399 (1947). The search may be unreasonable if it is out of proportion to the end sought, *Zimmerman v. Wilson,* 105 F.2d 583, 585 (3d Cir. 1939) or is without probable cause, *Scher v. United States,* 305 U. S. 251, 59 S. Ct. 174, 83 L.Ed. 151 (1938). Generally, however, what is reasonable cannot be stated in rigid and absolute terms, *Harris v. United States, supra;* the question of reasonableness being relative, *United States v. Costner,* 153 F.2d 23, 26 (6th Cir. 1946), so that each case is to be decided on its own facts and circumstances. *Bartlett v. United States,* 232 F.2d 135 (5th Cir. 1956). Thus removal of narcotics from defendant's stomach by means of a stomach pump administered in the presence of federal officers was unreasonable so as to render the narcotics and testimony concerning defendant's possession thereof inadmissible under the Fourth Amendment. *United States v. Willis,* 85 F. Supp. 745 (S.D. Cal. 1949). But another federal district court held evidence forcibly secured by a stomach pump admissible because of defendant's consent. *In re Guzzardi,* 84 F. Supp. 294 (N.D. Texas, 1949). The California Supreme Court, having adopted the exclusionary rule of evidence, *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 (1955), has held that taking of defendant's blood without his consent does not constitute unreasonable search and seizure under the California Constitution. *People v. Duroncelay,* 26 U.S.L. Week 2045, 312 P.2d 690 (1957). Although this amendment applies only to the national government and its agents, *Weeks v. United States, supra;* and is not *ipso facto* incorporated into the Fourteenth Amendment, *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L.Ed. 1782 (1949), the Supreme Court has held that the violation of defendant's body by the forcible use of a stomach pump was such brutal and offensive conduct as to be repugnant to the Due Process Clause of the Fourteenth Amendment, *Rochin v. California,* 342 U. S. 165, 72 S. Ct. 205, 96 L.Ed. 183 (1952), while the involuntary removal of blood from an unconscious person was not so violative, the test of reasonableness under the due process clause being far less strict than that applicable to federal officers under the Fourth Amendment. *Breithaupt v. Abram,* 352 U. S. 432, 77 S. Ct. 408, 1 L. Ed.2d 448 (1957).

While the Supreme Court has decided no cases dealing with the question of an unreasonable violation of the body under the Fourth Amendment, its decisions in the *Rochin* and *Breithaupt* cases, *supra,* would appear to offer the most helpful "judicial" guide in evaluating the court's decision in the instant case although a different standard is involved. Under the due process of law test, the conduct of the

offending federal agents may be reasonable so long as it is not brutal or shocking to the conscience while the Fourth Amendment prohibits any unreasonable search or seizure. Thus the Supreme Court applying the stringent test of the Fourth Amendment, would seemingly reject the reasoning of the instant decision for although forcibly removing narcotics from one's rectum may not be as brutal as pumping out one's stomach, it is certainly more shocking to the conscience. However, in the instant case, there was sufficient and probable cause for searching the accused, he having admitted that narcotics were concealed in him, and in the words of the court, "There is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for carrying narcotics."

ROY M. THORNTON, JR.

CONSTITUTIONAL LAW—VIOLATION OF FOURTH AMENDMENT

Appellant was convicted of illegal possession and transportation of distilled spirits without tax stamps affixed thereto in violation of 26 USC §§ 5008 (b) (1), 5642. The judgment of conviction was made on the admission in a federal court, of evidence obtained by state officers by wiretapping, in violation of Section 605 of the Federal Communications Act, 47 USCA § 605 (1934). It was not until the trial that the prosecutor first obtained knowledge of the wiretap. Appellant made a motion to suppress which was denied, and on appeal, *held,* affirmed. Evidence obtained by state officers through wiretap in violation of the Federal Communications Act without participating or collusion therein by federal officers is admissible in federal courts. *United States v. Benanti,* 244 F.2d 389 (1957).

The courts do not concern themselves with the method by which a party has secured the evidence which he adduces in support of his contentions. 22 C.J. *Evidence* § 158 p. 192 (1920). Evidence obtained by intercepting telephonic communications is not rendered inadmissible by the Fourth and Fifth Amendments. *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 ALR 376 (1928). The intercepted telephonic communications were admissible even if obtained in violation of state statute. *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Evidence obtained by a federal officer through the use of unlawful search and seizure would clearly be inadmissible in federal courts. *Weeks v. United States,* 232 U.S.

383, 34 S.Ct. 341, 58 L.Ed 652 (1914). But evidence seized by state officers in an illegal search made upon information obtained by tapping telephone wires is not incompetent in a prosecution in a federal court where the federal officers did not participate in the search and the search was not made in behalf of the federal government. *In re Milburne,* 77 F.2d 310 (2d Cir. 1935). By the common law of evidence, aside from self-incrimination, truth was received as truth no matter if it was discovered by reprehensible means. *Foley v. United States,* 64 F.2d 1 (5th Cir. 1933), *aff.,* 289 U.S. 762, 53 S.Ct. 796, 77 L.Ed. 1505 (1933).

The freedom and security of the individual, nay of the citizen, is the paramount interest of the government. The citizen is not only to be protected from his own folly but from those who pretend to protect that freedom. Wiretapping is a new feature in the curtailment of crime. How responseful in its application, how thorough in its operation! How quick the mind of man is to receive and apply upon first hearing these magical devices! Yet again and again before these devices are recklessly applied the naked question confronts us, "Is freedom being abridged here?" By way of an answer to this interrogatory it can be said that a few states have by legislative enactment provided for wiretapping. However, strict compliance with the rules of evidence must be observed. The order issued permitting the wiretap is given only upon proof of probable cause. The courts must always be on guard against over zealous law enforcement tactics which violate individual constitutional safeguards, but the concept of fairness must not be strained until it is narrowed to a mere filament. In a democracy such as ours with our organization of checks and balances a system could be developed whereby law enforcement agencies with all their branches, on the federal, state and local level, could legally and with proper surveillance make use of these new devices with a great deal of discretion. In dealing with crime nicety of method and considerations of delicacy must often give way to necessity.

DOMINIC G. BOCCO

CONTRACTS—LEASE—COMMERCIAL FRUSTRATION

Plaintiff leased a lot and filling station to defendant distributing company for fifteen years. Defendant was to have the right to use the premises "as and for a gasoline or oil service and filling station and as a general automobile service station." Rent was one cent per

gallon of gas delivered on the premises with a minimum of $75.00 and a maximum of $175.00 per month specified. Defendant distributed Sunoco products, but after seven months and without plaintiff's consent changed to Cities Service. Plaintiff's bill in equity to rescind the lease contends the latter gasoline is considerably less in demand causing a material commercial frustation. *Held,* the doctrine of commercial frustation does not apply. *Perry v. Champlain Oil Co.*,__N.H. __, 134 A.2d 65 (1957).

Historically the courts assumed that parties to a contract should provide for all contingencies. *Paradine v. Jane,* Aleyn 26, 82 Eng. Rep. 897, (1647). The harshness of this rule has been ameliorated, and under certain conditions impossibility of performance will give basis for relief. *Kinzer Const. Co. v. State,* 125 N.Y. Supp. 46 (1910). Commercial frustration, a relatively modern doctrine, is akin to the doctrine of impossibility of performance, *Dorn v. Goetz,* 192 P.2d, 121 (1948) in that both require extreme hardship to excuse the promisor. Commercial frustation goes one step further and assumes the possibility of literal performance but excuses performance because supervening events have essentially destroyed the purpose for which the contract was made. *Brown v. Oshiro,* 68 Cal. App.2d 393, 156 P.2d 976 (1945). However, the mere fact that performance on the part of the defendant has lost value is not enough; *Bourn v. Duff,* 96 N.H. 194, 72 A.2d 501 (1950) there must be a complete or nearly complete destruction of the purpose *both* parties to the bargain had in mind. *Moreland v. Credit Guide Pub. Co.* 255 Mass. 469, 152 N.E. 62 (1926). Some courts state the basis of commercial frustation is failure of consideration, *Lloyd v. Murphey,* 25 Cal.2d 48, 153 P.2d 47 (1944), while other authorities speak in terms of equitable allocation of risks. 6 CORBIN CONTRACTS, § 1322, p. 256 (1951). Under either theory the event must not be foreseeable. *Lloyd v. Murphey, supra.* English courts have refused to apply commercial frustration to leases of real property, *Leightons Investment Trust, Ltd. v. Cricklewood Prop. and Investment Trust Ltd.* (K.B. 1942) 167 L.T.Rep. 348, and a few American cases so hold. *Leonard v. Autocar Sales and Service Co.,* 392 Ill. 182, 64 N.E.2d 477 (1945). Probably a majority of jurisdictions have held that the doctrine of frustration is applicable to leases but "even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or near total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into." 6 WILLISTON, CONTRACTS (rev. ed.) § 1955, p. 5486.

The court rightly refused to apply the doctrine of commercial frustration in the instant case; the facts warrant no other conclusion. Other courts faced with facts similar to the instant case have used a different theory to arrive at the same result: when the amount of rent is dependent on the volume of lessee's sales and there is a stipulation of a substantial minimum rent, it has been held that there is no implied covenant to conduct business at all unless the intent of the parties is clearly obvious.

JOSEPH W. POPPER, JR.

TORTS—AGENCY—RESPONDEAT SUPERIOR

In an action against hospital and others for injuries sustained by patient when burned during course of operation, the Supreme Court of Kings County, found for the plaintiff and defendant appealed. The Supreme Court, Appellate Division, reversed the lower court's decision and plaintiff appealed. The Court of Appeals of New York *held* that the hospital is liable to patient for injuries sustained through negligence of hospital employees acting within the scope of employment, and the doctrine according a hospital immunity for the medical acts of negligence of its employees is abandoned and granted a new trial. *Bing v. Thunig,* 163 *N.Y.S.* 2d 3 (1957).

The doctrine of respondeat superior as to hospitals has since 1876 been treated as an exception to the general rule providing that a master is responsible for the torts of his servants, committed in the course of his employment. *Bugge v. Brown,* V.L.R. 264, 26 CL.R. 110 (1919). However, the Supreme Court of Massachusetts in *McDonald v. Massachusetts General Hospital,* 120 Mass. 432, 21 Am. Reps. 529 (1876) relying on a prior English decision, *Holliday v. St. Leonards,* 11 C.B.H.S. 192, 142 Eng. Rep. 769 (1861) which laid down the broad proposition that a charity will not be liable for the negligence of its agents, but which had apparently unnoticed by the Massachusetts court, been overruled in England prior to the *McDonald* decision, *Mersy Docks Trustees v. Gibbs,* 11 H. L. Cas. 686, 11 Eng. Rep. 1500 (1866), laid down the general rule that a patient could not hold a charitable hospital liable for the negligent acts of its employees. This decision remained the general rule with the exception of only two or three counts until as late as 1942, PROSSER, TORTS, p. 787, (2nd Ed. 1955). New York became responsible for another refinement widely used in cases involving hospitals in general which was the division

into categories of "administrative" and "medical" acts subjecting hospitals to possible liability by which the hospital might be further immunized against such acts classified as medical and supposedly done by professional workers acting as independent contractors. *Schloendorff v. New York Hospital,* 211 N.Y. 125, 105 N.E. 92 (1914). Until the *Schloendorff* case, New York had relied on a theory comparable to the *McDonald* case, *supra,* using a "waiver theory" to grant absolute immunity to charities in negligence cases. *Horden v. Salvation Army,* 199 N.Y. 233, 92 N.E. 626 (1910). This theory held an implied waiver of claim to those accepting the benefits of charity. However, in the *Schloendorff* case, because a trespass was involved and the patient was operated on against her will, the waiver theory was inapplicable. Relying to an extent on dicta in the case of *Hillyer v. The Governors of St. Bartholomew's Hospital,* 2 K.B. 820 (1909) in which the doctor involved was chosen and paid by the plaintiff, the New York Court of Appeals, in extending to a charity this last available immunity, held that the relationship between a hospital and its physician, because of his skill, was not of master and servant. The Schloendorff doctrine was qualified by the decision in *Phillips v. Buffalo General Hospital,* 239 N.Y. 188, 146 N.E. 199 (1924) to make the immunity rest on the nature of the act itself rather than the person performing it. And though the original basis of the Schloendorff decision, that the hospital was a "charity" was essentially overturned in *Sheehand v. North County Community Hospital,* 273 N.Y. 163, 7 N.E.2d 28 (1937), the administrative-medical distinction continued and even spread to other charity hospitals. *Steinert v. Brunswick Home, Inc.,* 16 N.Y.S. 2d 83 (1940); *Black v. Fischer,* 30 Ga. App. 109, 117 S.E. 103 (1923). The distinction between administrative and medical acts in the New York courts has met with something less than overwhelming clarity and precision, and as a result the cases indicate general disagreement and confusion. *Berg v. New York Society for the Ruptured and Crippled,* 154 N.Y.S. 2d 455, 1 N.Y.2d 499 (1956), noted in 42 CORNELL L.Q. 411, (1957) nullified the Scholendorff rule by holding a charity hospital liable for an admitted medical act performed by a completely non-professional salaried employee.

The instant case now ends the history of the hospital's exception to the established principle of respondeat superior in New York, and the state which may be credited with the founding of the medical-administrative distinction has now abolished it. Following *President & Directors of Georgetown College v. Hughes,* 130 F.2d 810 (D.C. Cir. 1942) the first in a number of cases in other jurisdictions.

8 MER. L. REV. 380 (1957), reversing the immunity rule, the court reiterated "charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing." So the ultimate fate of the Schloendorff rule, hedged about for several years by the courts, is now established, and especially so in view of the dissenting opinion in the instant case which pointed up the fact that the act complained of might be denominated an administrative default. The hospital then is finally returned to the same status as other businesses. While the application of the doctrine of respondeat superior is not without its own problems regarding general and special employees, the overturning of this long standing court made rule did no great violence to the setup and background of hospital organization.

JAMES E. WHITE

TORT—INVASION OF THE RIGHT OF PRIVACY—LETTERS FROM CREDITOR INFORMING EMPLOYER OF PLAINTIFF'S DEBT

Defendant wrote plaintiff's employer alleging a debt owed it by plaintiff and asking help from employer in collecting the debt, which, incidentally, plaintiff claimed she did not owe. The letter was placed in plaintiff's permanent employment file and she sues defendant for an invasion of her right of privacy. Defendant's demurrer, on the grounds that the complaint showed no cause of action, was overruled; on appeal, *held,* affirmed. *Gouldman-Taber Pontiac, Inc. v Zerbst,* 96 Ga. App. 48, 99 S.E.2d 475 (1957). Subsequently reversed on the ground that giving the information to the employer was not giving to the general public information concerning a private matter in which the public had, or could have, no legitimate interest, since an employer has a natural and proper interest in the debts of his employees. The right of privacy is not absolute but is qualified by the rights of others__Ga.__, 100 S.E.2d (Nov. 8, 1957, No. 19819)

The right of privacy, though in existence for many years, *Pavesich v. New England Life Insurance Co.,* 122 Ga. 190, 50 S.E. 68 (1905), has had only relatively recent recognition, as such, in the courts. This recognition came shortly after an article by Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," 4 HARV. L. REV. 193 (1890) which decried the sensationalism of the press at that time and pleaded for this right. New York was the first state to review the

novel doctrine, *Mackenzie v. Soden Mineral Springs Co.*, 27 Abb. N. Cas. 402, 18 N.Y. Supp. 240 (1891); *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y. Supp. 908 (1893), and the first to declare that the right did not exist. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). Three years later, Justice Cobb, speaking for an unanimous court and following the line of reasoning of the vigorous dissent of Justice Gray in the *Roberson* case, *supra*, forcefully declared that there was a right to privacy, the invasion of which is a personal injury and subjects one to damages. *Pavesich v. New England Life Insurance Co.*, *supra*. Now this right is recognized in at least twenty jurisdictions, is limited by statute in three more, is definitely rejected by only three, and nine more seem to be on the verge of accepting the doctrine. PROSSER, TORTS, pp. 636-637 (2Ed., 1955). Dean Prosser divides the tort into four divisions: (1) "intrusion upon the plaintiff's physical solitude or seclusion;" (2) "Publicity, which violates the ordinary decencies, given to private information about the plaintiff, even though it may be true and no action would lie for defamation;" (3) "putting the plaintiff in a false but not necessarily defamatory position in the public eye;" (4) "the unpermitted appropriation of some element of the plaintiff's personality for a commercial use." PROSSER, TORTS, pp. 637 ff. (2d ed., 1955). Originally, under classification (2), it was an invasion to publish to the world the fact that plaintiff had not paid his debts. *Brents v. Morgan*, 221 Ky. 765, 299 S.E. 967 (1927); *Thompson v. Adelberg & Berman*, 181 Ky. 487, 205 S.W. 558 (1918). But such fact had to be published to the whole world, and not just to one person. *Patton v. Jacobs*, 118 Ind. App. 358, 78 N.E.2d 789 (1948), or to a few, *Davis v. General Finance and Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950), and, of course, had to be published to someone other than the plaintiff, *Davis v. General Finance and Thrift Corp.*, *supra*.

The instant case, one of first impression, goes no further: employer here did nothing but place the notice from defendant on file. Still, the Court of Appeals of Georgia said, this was a sufficient invasion of plaintiff's right of privacy to allow recovery. But, the Supreme Court of Georgia found that employer had some proper interest in plaintiff's debts, though just exactly what that interest is does not appear from the court's opinion. Further the court speaks of the "rights of others" that qualify plaintiff's right of privacy. By implication these "others" must be defendant and employer; but just what right the latter has to such information is not apparent, and how the publication of the information to the latter in any way affects the right of

the former to collect his debt is not explained by the court. In view of the part played by Georgia in developing the law of right of privacy, there would seem to be no real justification for the court's holding.

C. EDWIN CHAPMAN, JR.

WILLS—LIABILITY OF A DRAFTSMAN TO A LEGATEE—PRACTICE OF LAW

Plaintiff, sole legatee in a will drafted for a testator by the defendant, a notary public, was permitted to recover damages, when the will was refused probate because of improper attestation. On appeal to the district court of appeals. *Held*: affirmed. Defendant acted as an attorney instead of a "scrivener" in violation of statute limiting the practice of law to members of the bar, and the plaintiff was a member of the class of persons to be protected by the statute here. *Biakanja v. Irving*, __Cal. __, 310 P.2d 63 (1957).

It is generally held that the practice of law is not involved in the function of a "scrivener" of legal instruments. *People v. Sipper,* 61 Cal. App. 2d Supp. 844, 846, 142 P.2d 690, 962 (1943); 5 Am.. Jur *Attorney and Client* § 3, p. 263. The drawing of any instrument accompanied by advice as to the legal effect does constitute the practice of law. *Paul, et al. v. Stanley,* 168 Wash. 371, 12 P.2d 577, (1957). However, under a New York statute, defining the practice of law, a single isolated act in drawing a will was held insufficient to constitute the practice of law. *People v. Goldsmith,* 249 N. Y. 586, 164 N.E. 593 (1928). The legatee in a will who failed to take because of the negligence of the attorney who drew the will cannot recover from the attorney as there is not privity of contract between the legatee and attorney and too, the legatee is not a beneficiary of a third party contract. *Buckley v. Gray,* 110 Cal. 339, 42 P. 900, 31 L.R.A. 862 (1895). "An attorney is not ordinarily liable to third persons . . .for his own acts committed in the exercise of his proper functions as attorney . . . the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting injury and one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter . . ." 5 Am. Jur., *Attorney and Client* § 147, p. 347. The general rule is that the obligation of an attorney is to his client and not to third persons. *Savings Bank v. Ward,* 100 U.S. 195, 25 L.Ed.

621 (1880), but attorneys are liable to third persons when there is fraud or collusion or tortious act. *Lackey v. Vickery,* 57 F. Supp. 791 (D.C.W.D. Mo. 1944). It is essential that the relation of attorney and client exist between the attorney and the person seeking to hold him liable. *Maryland Casualty Company v. Price,* 231 F. 397 (4th Cir. 1916); *Lavall v. Gorman,* 180 Pa. 532, 37 A. 98, 57 Am. St. Rep. 662 (1897). In a case directly in point to the instant case the court refused to hold a drawer of a will liable who was not an attorney. *Mickel v. Murphy,* 305 P. 2d 993 (Cal. 1957) (distinguished in instant case on a procedural point).

If the plaintiff had been a client and the defendant had been an attorney the result in the instant case would not be at all unusual. However, here the plaintiff is a third person and the defendant is not an attorney. Under the clear weight of authority a third person cannot recover or maintain an action against a negligent attorney without a showing of fraud or collusion as there is no privity of any kind. The grounds upon which the court based its decision in the instant case do not appear to be strong enough to offset the effect of this decision which is to hold a layman liable in circumstances where if he were an attorney he would not be liable. The proper remedy would appear to be a criminal prosecution by the state and not a civil action for damages by the legatee.

JOHN H. HICKS