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Criminal Law—Evidence Obtained by Illegal Search and Seizure

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The purpose of a damage suit, where circumstances similar to those in the principal case are relied upon, is purely compensatory.¹⁴ Therefore, a rule which compensates the plaintiff, as nearly as possible, for the damage which he has actually suffered is desired. To obtain this result the Missouri rule, upon sound reason, commends itself.

—E. L. D.

CRIMINAL LAW—EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.—Defendant was indicted and convicted of unlawfully storing ardent spirits for sale. At the trial whiskey and other articles obtained from the defendant's premises by a search under a warrant, void under the Virginia search and seizure statute, were admitted in evidence. *Held*, the admissibility of such evidence is not affected by the illegality of the means by which it has been obtained. *Hall v. Commonwealth*, 121 S. E. 154 (Va. 1924).

The Virginia court follows the one-time firmly established rule in the United States as first announced in *Commonwealth v. Dana*, 2 Metc. 329. The first departure from that rule came in the United States Supreme Court in 1885 where it was held that admitting such evidence was a violation of both the Fourth and Fifth Amendments of the Federal Constitution. *Boyd v. U. S.*, 116 U. S. 616. This new doctrine, though qualified by a later case, to the extent that a motion must be made for the return of the evidence before offered had little following in the state courts before the adoption of the Eighteenth Amendment. *Weeks v. U. S.*, 232 U. S. 383; 4 WIGMORE ON EVIDENCE, 2nd Ed., § 2183, and cases cited. From that time the cases involving the question have been numerous and many courts have followed the doctrine of the Federal Court. *Tucker v. State*, 128 Miss. 211, 90 So. 845; *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860; *People v. Marchausen*, 204 Mich. 559, 171 N. W. 557. The arguments in support of this new doctrine are that the officer making such search is an agent of the state and to permit the use of evidence taken by him without authority is to validate an unreasonable search and seizure; and that such use is compelling the accused to testify against himself. *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385; *State v. Wills*, 91 W. Va. 659, 114 S. E. 621. On the other hand it is said that to look behind the evidence raises the trial of outside issues, that the Fourth and Fifth Amend-

¹⁴ See Hugh Evander Willis, "Measure of Damages When Property is Wrongfully Taken by a Private Individual," 22HARV. L. REV. 419.

ments (or the corresponding clauses in the state constitutions) do not apply, and that the exclusion of such evidence is an indirect penalty on the law enforcers. *People v. Mayen*, 188 Cal. 237, 205 Pac. 435; *State v. Anderson*, 31 Idaho 514, 174 Pac. 124. As a matter of public policy, Mr. Wigmore suggests that it is not well to coddle the law breakers. AMERICAN BAR ASSOCIATION JOURNAL, Aug. 1922. In *State v. Wills*, *supra*, the court says, "if we err, we would rather err on the side of liberty." The majority of leading cases in the state courts adopting the later doctrine have been on indictments under liquor and "pistol toting" laws. Mr. Wigmore and the majority of the states are to the effect that the adoption of the view of *Weeks v. U. S.*, *supra*, is error.

—R. M. M.

BILLS AND NOTES—PAYMENTS OUT OF A PARTICULAR FUND.—D bought stock in the P Company, of which he was an employee, giving a promissory note, "payable in dividends to be declared by the P company," the note being made to the president of the company. Six years later he gave a renewal note for the unpaid balance of the first note, it being stipulated in the note that "dividends on the said stock are to be used in payment as received." *Held*, Consideration must be shown for the second note, other than the renewal, the first note containing only a conditional promise to pay, while the second was a promise to pay at all events. *Boardman v. Frick*, 120 S. E. 883, (W. Va. 1924.)

The cast represents a clear-cut illustration of how the courts interpret that section of the negotiable instruments law which states that "a promise is unconditional . . . though coupled with an indication of a particular fund out of which reimbursement is to be made . . . but an order to pay out a particular fund is not unconditional." W. VA. CODE, c. 98A, § 3. In the absence of words making clear the intent, it is a question of construction whether the fund in question is referred to as a measure of liability or means of reimbursement. NORTON, BILLS AND NOTES, 4th Ed., 52; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452; *Union Bank of Bridgewater v. Spies*, 151 Ia. 178, 130 N. W. 928; *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120. The mere fact that a particular fund is mentioned or referred to in an instrument does not make it payable out of that fund. 1 PARSONS, BILLS AND NOTES, 43. But if the note is payable "out of the rents," or "out of a certain claim," or "out of the dividends," the note is an