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Constitutional Law--Evidence--Searches and Seizures

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CONSTITUTIONAL LAW—EVIDENCE—SEARCHES AND SEIZURES.—The defendant was arrested by an officer without a warrant or other justification. Upon search “moonshine” liquor was found in his possession. The liquor was offered in evidence by the state and admitted over objection. The defendant had not previous to the trial requested the return of the liquor. *Held*, the admission of the liquor in evidence was error, being in contravention of the unreasonable search and seizure clause of the state Constitution and also the clause providing that on a criminal trial the accused shall not be compelled to testify against himself. *State v. Wills*, 114 S. E. 261, (W. Va. 1922).

Social interests demand that unlawfully seized liquor should be admitted against the alleged malefactor, particularly if it is sanctioned by authority. By principles of construction, however, clauses of constitutions dealing with privileges should be construed liberally in favor of the accused. The weight of state authority and the foremost text-writers hold unlawfully seized chattels are admissible against the accused. Their reasoning is that the Fourth and Fifth Amendments to the Federal Constitution (the substance of which is embodied in the corresponding clauses of our state constitution), are independent units; the principle of the Fourth having come into existence one hundred years after that of the Fifth, and in response to very different political controversies. 4 WIGMORE, EVIDENCE §§ 2250, 2264. It is urged therefore that neither amendment can properly be brought to supplement the other. Although the evidence is admissible the accused may sue the official for damages, or the official may be prosecuted for assault and battery. *Regan v. Harkey*, 40 Tex. Civ. App. 16, 87 S. W. 1164; *McClurg v. Brenton*, 123 Ia. 368, 98 N. W. 881; *Gardiner v. Neil*, 4 N. C. 104; *Lawton v. Cardell*, 22 Vt. 524; *State v. Wagstaff*, 115 S. C. 198, 105 S. E. 283; *Grim v. Robinson*, 31 Nebr. 540, 48 N. W. 388; *Grummond v. Raymond*, 1 Conn. 40. Having given the accused a remedy, the courts dispose of the objection that the admission of the chattel in evidence is compelling the accused to testify against himself, by the answer that the court cannot take notice of how the evidence was obtained, that the evidence speaks for itself and not for the accused. *State v. Flynn*, 36 N. H. 64; *Chastang v. State*, 83 Ala. 29, 3 So. 304; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1047; *Franklin v. State*, 69 Ga. 36; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002. The decision in the principal case proceeds upon the theory that the arrest and search were unlawful, thereby making them

unreasonable and within the inhibition of the constitution. The remedy by civil action alone is not only inadequate, but withholds from the defendant the constitutional privilege of freedom from compulsion of testifying against himself on a criminal trial. The court adopts the view that the two amendments are inter-related and supplementary to each other, regardless of their independent historical development. It rests upon the authority of the United States Supreme Court and a growing minority of the state courts. *Boyd v. United States*, 116 U. S. 619; *Gouled v. United States*, 255 U. S. 298; *People v. Le Vasseur*, 213 Mich. 177, 182 N. W. 60; *People v. Maven*, 35 Cal. App. 442; *Youman v. Commonwealth*, 189 Ky. 152, 224 S. W. 860; *Town of Blacksburg v. Beam*, 104 S. C. 146, 88 S. E. 441; *Tucker v. State*, 128 Miss. 211, 90 So. 845; *State v. Rowley*, 187 N. W. 7 (Ia. 1922); *Callendar v. State*, 136 N. E. 10 (Ind. Sup. 1922); *State v. Gibbons* 118 Wash. 171, 203 Pac. 390; *Hughes v. States*, 145 Tenn. 544, 238 S. W. 588. The justification of this doctrine is that if the unlawfully seized chattel is admissible it reduces the Fourth Amendment to a mere form of words as pointed out by Mr. Justice Holmes. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. The United States Supreme Court, while it refuses to permit the unlawfully seized chattel to be introduced in evidence, yet qualifies the doctrine insofar as it requires the defendant to petition the court before the trial for the return of the goods seized. If objection is made for the first time at the trial, the goods will be admitted. *Weeks v. United States*, 232 U. S. 383. The principal case, however, goes the second mile, in that the chattel will be excluded if objection is made for the first time at the trial. This decision is a long stride in the progress of the law of evidence. 35 HARV. L. REV. 694. If it is said the doctrine announced makes the malefactor more immune from punishment, it is sufficient to answer, if the purpose of the Fourth and Fifth Amendments is to guarantee to the citizen a privilege in substance, and not in form, they have been so construed in the principal case.

—H. C. H.