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ATTEMPTS TO NULLIFY THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION.*

JOHN B. WILSON**

For the first time in the history of the United States we have the federal and many state governments undertaking the enforcement of laws enacted by each for the same purpose, to-wit, the prohibition of the use of intoxicating liquor as a beverage, and the purpose of this paper is to call attention to some of the results arising from the cooperation among state and federal officers upon the rights of citizens guaranteed under the fourth and fifth amendments to the Constitution of the United States, especially the fourth, and incidentally the fifth.

Until the "National Prohibition Act" came into effect, the average citizen had, if any, a very hazy conception of his rights under the fourth amendment. And I may also say many lawyers were in the same fix because of the infrequent use of the Federal search and seizure warrant. The questions arising under such warrants were comparatively infrequent in the courts. There was, of course, more familiarity with the provisions of the fifth amendment, owing to the fact that questions coming within the purview of this amendment were constantly arising in the administration of the criminal law. But, with the coming of prohibition, the situation has changed, and the fourth has come to the front with a rush, and search and seizure has become the almost universal means of enforcing the law, and especially the prohibition law, demanding the earnest study of the provisions of this amendment by the lawyer that he may be able properly to defend his client and assert his rights, and to aid the courts in arriving at a correct decision upon the questions arising thereunder.

To arrive at a full understanding of the importance and meaning of these two amendments and the right of the citizens under them, it is pertinent to give a short sketch of the origin of these

* Paper read by John B. Wilson, of the Ohio County Bar, before a meeting of the Bar held November 16, 1925.
amendments and the importance attached to them by the people of this country at and shortly after the time of the formation of the federal government under the Constitution.

Search warrants were unknown to the early common law of England, but later came into use gradually, and even at that early day Lord Coke denounced them as illegal. However their use by imperceptible increment gradually extended in England and it became the practice for the Secretary of State to issue, on his own motion, general warrants for searching private houses and seizing books and papers and using the evidence so obtained to convict the owner of libel. From this the practice grew until their use became so universal that the person, property and premises of the individual were subject to unlimited search and seizure, the practice becoming so oppressive and unbearable that Parliament and the courts found it necessary to restrain their use.1

The practice was transplanted to the American colonies under the name of writs of assistance and their use of these writs became so outrageous that there was an almost universal demand on the part of the people that the constitutional convention should include in the Constitution a bill of rights guaranteeing the natural and unalienable rights of the individual citizen. For some reason this was not done, and it is to be presumed that it was omitted in order to enlist the support of that considerable portion of the population of wealth and influence, and those opposed to innovations in government, on behalf of the ratification of the original Constitution as submitted by the convention to the states.

The omission of the bill of rights from the Constitution as originally proposed and adopted, did not, however, dampen the ardor of the people, and when the Constitution was submitted for ratification to the states, several of the conventions, notably those of Virginia, New York, Rhode Island and North Carolina, adopted bills of rights along the same general lines and insisted that the Constitution be amended to include those rights.

The Virginia Convention, on June 27th, 1788, adopted the following, to be attached to the ratification resolution, passed June 26th, 1788:

"That there be a declaration or bill of rights asserting and securing from encroachment, the essential and unalienable rights of the people in some such manner as following."2

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1 Search and Seizure, 24 R. C. L. 701, § 2.
2 3 Elliot, Debates, 328.
Among others were the substance of the fourth and fifth amendments, the fourth being as follows:

"14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specifically naming or describing the place or person are dangerous and ought not to be granted."

The eighth paragraph of this declaration is in substance the fifth amendment.

The New York convention, on July 26th, 1788, ratified the Constitution, but with a preliminary declaration of certain rights, among them the substance of the Fourth and Fifth Amendments, and in substantially the same language as those of the Commonwealth of Virginia. In concluding this series of declarations, and preceding the ratification of the Constitution, the convention adopted the following:

"Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration, * * * * we, the said delegates * * * *" (here follows the resolution).

The Rhode Island Convention, on May 29th, 1789, adopted practically the same declarations as New York, including the last quotation.

The Convention of the State of North Carolina, which met on July 21st, 1788, in the course of its proceedings, adopted the following resolution:

"RESOLVED, That a declaration of rights, asserting and securing from encroachment the great principles of civil and religious liberty, and the unalienable rights of the people, together with amendments to the most ambiguous and exceptionable parts..."
of the said Constitution of government, ought to be laid before Congress, and the conventions of the States that shall or may be called for the purpose of amending the said Constitution, for their consideration, previous to the ratification of the said Constitution on the part of the State of North Carolina.'"7

This convention also included in the bill of rights passed the substance of the fourth and fifth amendments.8 This convention, having passed this declaration of rights, refused to ratify the Constitution, and adjourned sine die on August 4th, 1788; but, after amendments had been proposed by Congress embodying their bill of rights, another convention was called, and ratified the Constitution on November 21st, 1789.

The Congress, meeting in New York on March 4th, 1789, recognizing the almost peremptory demand of the various state conventions, proposed twelve amendments to the Constitution, covering the various bills of rights adopted in various states. Ten of those were promptly ratified and constitute our federal bill of rights.

That the adoption of the bill of rights was apparently the paramount issue is further evidenced in the inaugural address of General Washington upon assuming the office of President and in the reply addresses made thereto by the Senate and the House of Representatives, the President referring to the subject in the following language:

"Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of iniquitude which has given birth to them. Instead of undertaking particular recommendation on this subject, in which I am guided by no lights derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good; for I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an united and effective government, or which ought to await the future lessons of experience, a reverence for the characteristic rights of freemen and a regard for the public harmony will sufficiently influence your deliberations on the question how far the former can be impregnably fortified or the latter be safely and advantageously promoted."9

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7 Id. 331.
8 Id. 333.
9 1 Messages and Papers, 53.
The Senate in its reply refers to the subject in the following language:

"We beg you to be assured that the Senate will at all times carefully cooperate in every measure which may strengthen the Union, conduce to the happiness or secure and perpetuate the liberties of this great confederated Republic."\(^1\)

The House of Representatives is more explicit in its address, using the following language:

"The question arising out of the fifth article of the Constitution will receive all the attention demanded by its importance and will, we trust, be decided under the influence of all the considerations to which you allude."\(^2\)

From this brief sketch of the history of the Fourth and Fifth Amendments, we can easily see that these, among other things contained in the bill of rights, were considered of paramount importance and demanded the first consideration for the Congress. And the next matter for consideration is the application and interpretation of the principles involved and of the language used.

May it ever be said to the credit of the Supreme Court of the United States, the greatest judicial tribunal in the world, and the final arbiter of the liberty and happiness of the people of this country, that it has always and consistently decided all questions arising under the Fourth Amendment liberally in favor of the citizen and strictly against the search warrant, uniformly holding that a proper search and seizure warrant containing all of the constitutional and statutory requirements must be obtained to search the home of the citizen or seize his property or person, and that unless all of the requirements were observed no evidence so obtained can be used against a person in a criminal case. It is rather unfortunate that some of the lower courts have not held so firmly to the principles involved and have decided that it makes no difference how evidence is obtained but if pertinent it may be used.

The broad and liberal treatment of this subject by the Supreme Court is well stated by the court in the case of *Gouled v. United States*,\(^3\) as follows:

\(^1\) Id. 65.
\(^2\) Id. 56.
\(^3\) 225 U. S. 303.
"It would not be possible to add to the emphasis with which the framers of our Constitution and this Court have declared the importance to political liberty and to the welfare of our country of the observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is, that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property', that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen. It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them by imperceptible practice of the courts or by well intentioned but mistakenly overzealous executive officers."

The Supreme Court, in its latest opinion on this subject is, if anything, holding more firmly than ever to its position on this question.

We now come to the discussion of the apparent efforts of the prohibition officers to evade the federal constitutional and statutory requirements for search and seizure warrants.

It will no doubt be remembered that for several years after the National Prohibition Act came into effect, the officers raided far and wide without warrants or with pieces of paper purporting to be such, but without any resemblance to a legal warrant, except that they had printed on the back the words "Search Warrant." Even lawyers seem to have overlooked this important matter, with the result that hundreds of convictions were had, thousands of dollars in fines imposed and collected and jail sentences imposed by the use of evidence thus obtained and which was absolutely inadmissible against the defendants.

When, however, this situation was called to the attention of the courts, they very promptly excluded such evidence and discharged the defendants.

After this the federal officers resorted to the expedient of having state officers swear out state warrants and then went along and participated in the search. This was also held to exclude the evidence as having been obtained by federal officers in the manner prohibited by the federal constitution and statutes. It then became necessary to evolve some other expedient, and this is what happened: the federal officer reports to a state officer his sus-

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32 Agnello v. United States, 46 Sup. Ct. 4.
picious that the prohibition law is being violated, whereupon the state officer, on information and belief, swears out a state warrant and apparently invites the federal officer to go along, as an unofficial observer. The search is conducted by the state officers, some one arrested, and, very frequently, instead of being taken before the issuing magistrate and proceeded against to the conclusion of the case in the state courts, the prisoner is taken before the United States Commissioner and upon the information obtained by the federal officer from observation during the state raid he makes complaint of a violation of the National Prohibition Act, and the prisoner is proceeded against in the federal court. And, strange to say, it is now held that such evidence is admissible as not having been obtained by the federal officers, but having been wholly obtained by the state, and that the Government may use such evidence in the federal court against the defendants, and this in face of the apparent fact that the evidence was obtained in a manner absolutely illegal under the federal law. The very natural result of such holding is to render the Fourth Amendment and its fellow amendment, the Fifth, wholly innocuous, and places in the hands of administrative officers the power to repeal, in effect, these amendments.

The questions discussed in the preceding paragraph have as yet not been passed upon by the Supreme Court, but I have every confidence that when the question comes before this Court it will very promptly hold such evidence, obtained in the manner outlined, inadmissible in a federal court.

In the method of obtaining evidence for use in the federal courts and getting around the federal constitution and laws, I believe the officers come very close to violating Section 37 of the federal criminal code, as they certainly combine and confederate together to violate the federal constitution and laws relating to federal search and seizure. In reply to this it may be said that they are engaged in the lawful purpose of enforcing the law. This may be conceded, but it must not be forgotten that—

"A conspiracy is a combination and confederation of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

In this connection it seems proper that the subject of search

warrants authorized by the West Virginia Code\textsuperscript{16} should be brought to your attention. This section authorizes a Justice of the Peace to issue a search warrant upon an affidavit stating that the affiant has reason to believe and does believe that the prohibition law is being violated in the manner set forth in that statute. This seems to me to be a direct violation of a provision of the state constitution, which reads as follows:

"The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized."\textsuperscript{17}

The generally accepted definition of "probable cause" is:

"Such a state of facts or circumstances as would lead a man of ordinary caution and prudence to believe that the accused person is guilty of the offense charged."\textsuperscript{18}

There are some variations in defining "probable cause" in different courts, but all are substantially the same, and all lay stress on "such a state of facts or circumstances", and to the "cautious and prudent man."

The above being the universal definition of "probable cause", both now and at the time when our constitutions were adopted, it seems to me to indicate plainly that the state statute referred to violates the constitution.

It must be borne in mind that the language of the constitutions of the United States and of the State of West Virginia, must be interpreted and applied with reference to the meaning of the definition of the words "probable cause" as it was defined and understood at the time the constitutions were adopted. With this in mind it would seem that the issue of a search and seizure warrant upon the mere statement of the affiant "that he has cause to believe and does believe" that the law is being violated, unsupported by any facts or circumstances set forth in the affidavit is clearly in violation of the constitution of this state, as it certainly is beyond the power of the legislature by statute to change the constitution.

\textsuperscript{17} Art. III, § 6.
\textsuperscript{18} Vinal v. Core, 18 W. Va. 1; Claiborne v. Chesapeake etc. Ry. Co., 46 W. Va. 363, 33 S. E. 282. See also PROBABLE CAUSE, 32 Cyc. 402.
and the meaning of probable cause, and say what shall constitute probable cause, and thereby change the meaning of those words as they were understood at the time they were written into the constitution.

Notwithstanding the apparent unconstitutionality of said statute, the Supreme Court of West Virginia has, in a recent case,\(^9\) upheld such a search warrant as legal and that the statement of the affiant that "he has reason to believe and does believe" constitutes sufficient "probable cause". This decision apparently opens the door for the legislature to do pretty much as it pleases in the future in relation to search and seizure matters, and it seems that an affiant could as well say that he believes Bill Smith is selling liquor and that this would be just as sufficient as the above-quoted language of the state statute.

It is not for the benefit of law breakers that these views are stated, for the danger lies in the fact that these unlawful methods used by the officers and sustained by the courts in the enforcement of prohibition will imperceptibly extend to other matters and gradually encroach upon the rights of the citizen until we will be facing the same conditions as did our forefathers. It is my sincere opinion that it is the duty of every lawyer under his oath to stand solidly against any encroachment upon the dearly bought liberty of himself and his fellow citizens, for it is true that eternal vigilance is the price of liberty.