AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Criminal Justice/Search and Seizure

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Fisher v. McGirr, 67 Mass. 1 (1854)

Patrick McGirr, a constable in Sandwich, Massachusetts, entered the home of Theodore Fisher and seized a large quantity of intoxicating liquors. Fisher filed a lawsuit against McGirr, claiming that the constable unlawfully trespassed on his property. McGirr responded that his entry was legal under Massachusetts law. The Massachusetts temperance statute permitted government authorities with a valid warrant to search a person's premises and seize any intoxicated beverages intended for sale. The crucial provision declared,

> *if any three persons . . . make complaint, under oath or affirmation, that they have reason to believe . . . that spirituous or intoxicating liquors are kept or deposited and intended for sale, by any person not authorized . . . in any store, shop, warehouse, or in any steamboat or other vessel, or in any vehicle of any kind, or in any building or place, in said city or town, said justice or judge shall issue his warrant of search, to any sheriff . . . who shall proceed to search the premises described in such warrant.*

After the seizure took place, the statute required the owner of the beverages to appear before a judge. If the owner failed to appear or prove the beverages were imported and not intended for sale, the beverages were forfeited to the state and the owner either paid a $20 fine or was imprisoned for thirty days. The trial court found for McGirr on the ground that he had a legal warrant. Fisher appealed that decision to the Supreme Judicial Court of Massachusetts. He claimed that the Massachusetts law authorized general warrants violated of the state constitution.

Chief Justice Lemuel Shaw reversed the state court judgment. He ruled that the state temperance law violated the state constitutional ban on general warrants and also violated property rights protected by the state constitution. Why did Shaw reach these conclusions? Shaw began by maintaining that the legislature could ban intoxicating liquors. Were the provisions authorizing search warrants necessary for implementing the Massachusetts ban on the sale of intoxicating liquors? To what extent does Shaw's decision make the temperance law difficult or impossible to enforce. Is McGirr *rooted in the law of general warrants, judicial hostility to temperance laws, or a combination of both?*

CHIEF JUSTICE SHAW

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We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law . . . to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. Putrefying merchandise may be stored in a warehouse, where, if it remain, it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night; however secreted, a fire in the building would be sure to find it, and the lives and limbs of courageous and public spirited firemen and citizens, engaged in subduing the flames, would be endangered by a sudden and terrible explosion. It is of the highest importance, that such persons should receive the amplest encouragement to their duty, by

giving them the strongest assurance that the law can give them, that they shall not be exposed to such danger. This can be done only by a rigorous law against so keeping gunpowder, to be rigorously enforced by seizure, removal, and forfeiture.

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Supposing then that it is competent for the legislature, as one of the means of carrying into effect a law to prohibit the unlawful sale of intoxicating liquors, to declare the keeping of such liquors for the purpose of sale, in any place, within any city or town of the Commonwealth, unlawful, and to declare the liquors, thus kept, liable to seizure and forfeiture . . ., under a proper and well guarded system of regulations; the question is, whether the measures, directed and authorized by the statute in question, are so far inconsistent with the principles of justice, and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and constitution of the Commonwealth, that it was not within the power of the legislature to give them the force of law, and that they must therefore be held unconstitutional and void; and the court are all of opinion that they are.

. . . The subject of general warrants, and of illegal searches and seizures under them, had been much discussed in England before the adoption of our constitution, and was probably well understood by its framers. *Entick v. Carrington*. . . . The measures authorized and directed by this act, are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.

Because the act does not require the three persons, who are to make complaint, to state that they have reason to believe and do believe that intoxicating liquors are kept or deposited and intended for sale by any person named; nor does it require the magistrate to state, in his warrant to the searching officer, the name of any person believed to be the owner or keeper of such liquors, nor the name of any person having the custody or possession thereof, nor the name of any person having the intention to sell the same. . . . In this respect the warrant is general, not affecting any person, even by way of belief or suspicion, of the unlawful act of keeping such liquors for sale.

It does not limit the officer's authority and right of seizure to the articles described, by quantity, quality or marks; nor does it even restrict the officer's power of seizure to liquors kept and intended to be sold, although it is the avowed purpose of the act to make the keeping of such liquors unlawful, and subject them to forfeiture. . . .

. . . [I]t is the imperative and indispensable duty of the officer, to seize all the liquors found, however clearly it may appear to him that the larger quantity is about to be sent to other states, or to a foreign country, and not intended for sale in the city or town where the liquors are found, or even in the Commonwealth. . . . Thus the authority to seize is carried greatly beyond the articles, the possession of which is made unlawful, and the keeping of which is intended to be treated by the act as a nuisance; to wit, spirits kept and intended for sale.

It appears to us, therefore, that this act in terms warrants and requires unreasonable searches and seizures, and is therefore contrary to the constitution.

If it be said that the act provides for as much certainty in the description of the articles to be searched for and seized, and in the definition and limitation of the officer's power, as the nature of the case will admit of; that the complainants cannot know with certainty, before search is made, that spirits are deposited in the place described, or are intended for sale, and can only state their belief; and that neither the complainants nor the magistrate can know, before search, who is the owner, or has the custody, or intends to sell, and therefore cannot name him; and that it is impossible for the complainants or for the searching officer to distinguish what part of the liquors found is intended for sale, and that that must be a subject of inquiry before the magistrate afterwards; the answer seems to us to be obvious, that if these modes of accomplishing a laudable purpose, and of carrying into effect a good and wholesome law, cannot be pursued without a violation of the constitution, they cannot be pursued at all, and other means must be devised, not open to such objection.

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There can be no doubt that spirituous liquors, at least before they are judicially and finally confiscated and ordered to be destroyed, are property; this act so recognizes them.

Then recurring to the course of proceeding under this statute, the first step required is the complaint of three persons, *ex parte;* and no provision is made that in any stage of the proceeding these complainants are to be again examined, nor that the party whose property is taken shall have opportunity to meet them face to face; yet, as we shall see, their oath to their belief of a certain fact is the only evidence, upon which the property may be adjudged forfeited.

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These measures seem wholly inconsistent with the right of defending one's property, and of finding a safe remedy in the laws.

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. . . Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial; no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. . . .

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. . . We have only to look at the plain directions of the act, to perceive that it provides for no trial, in any proper or judicial sense; that it permits and requires a judgment of forfeiture, if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice, and contrary to the letter and spirit of the Declaration of Rights. This statute declares that a subject may be deprived of his property under the forms of law, without meeting the witnesses face to face, without being fully heard in his defence, in an unusual mode, not by the judgment of his peers, or the law of the land.

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The return of the officer, which alone can bring before the magistrate the name of an owner or keeper, cannot satisfy the requisites of the constitution; it is not a direct charge against him of keeping liquor, intended for sale; he is not summoned to answer such a charge, but to inform him of the seizure; and the charge is not on oath. The judgment to be rendered for fine and costs is not a distinct, independent judgment, on a charge of a personal offence, but is only incidental to a judgment of forfeiture and confiscation of property. The provision in regard to the judgment *in personam* is, after directing that the liquor shall be declared forfeited and destroyed, that the owner or keeper of said liquor shall pay a fine of twenty dollars, &c. "if in the opinion of said court, said liquors shall have been kept or deposited for sale contrary to the provisions of this act." Now supposing this should be construed to mean a judicial opinion, formed upon examination and proof, it would be obnoxious to the objections of being repugnant to the constitution: First, because it would be a conviction for a penalty, without any substantial and formal charge described and set forth, with opportunity to defend; contrary to the Declaration of Rights; and secondly, because the matter of fact, of which an opinion is to be formed, in order to convict, is not that the respondent, whose name has been returned as owner or keeper, has kept the liquor with intent to sell; but only that the liquors were kept for sale, which might be true, if kept by any other person. A party therefore may be convicted and sentenced to fine and costs, and imprisonment, for an offence neither legally charged, nor legally proved, to have been committed by him.

. . . This is in the nature of an action of trespass *vi et armis,* and the question is, whether it will lie against an officer, who merely acts under the direction of a warrant from a magistrate, and does not go beyond the line of his duty, as marked out by his warrant. This is certainly an important consideration; inasmuch as it is for the interest of the community that subordinate and executive officers should, as far as possible, be protected in the full and fearless discharge of their duties, leaving all responsibility for errors in judgment, and irregularities of process, to rest upon others. But this principle must have some limit; it would be dangerous and injurious to the common rights of citizens, if one man, under the mere color or semblance of legal process, could justify the arrest and imprisonment of the person, or the seizure and removal of the property of another, without any responsibility. And we take the well settled line of distinction to be this: If the magistrate or tribunal, from which the process issues, has jurisdiction, and the process is apparently regular, the officer may safely follow and obey it, and justify himself under it. But if the magistrate has no jurisdiction, the process is not merely voidable, but wholly void; the officer taking property under it, has no authority, and is therefore liable to an action of trespass.

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The law relied on for a justification, being void, gave the magistrate no jurisdiction and no authority to issue the search warrant, the officer cannot justify the seizure under it, and therefore an action lies against him for the taking.

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