THE

AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

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CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING REPORTS:

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cumbered by the plaintiff's mortgage lien, but if the other property mortgaged to the plaintiff should upon sale prove to be sufficient to pay the mortgage debt, then the homestead would have been unincumbered, and to have required this property to be first sold, would have deprived her of the benefit of her homestead claim, and for this reason the application of Lorinda Marr to marshal the assets, so as first to expose this tract to sale, should have been refused.

[Omitting a point of pleading.]

Let the decree be affirmed.

Decree affirmed.

FIFE v. STATE.

(31 Ark. 455.)

Constitutional law — Carrying concealed weapons.

The act prohibiting the carrying of any pistol as a weapon was intended to proscribe such pistols as are usually carried concealed upon the person, and not such as are ordinarily used in warfare, and therefore does not infringe the constitutional privilege of the citizen to bear arms. (*See note, p.* 561.)

CHARGE of unlawfully carrying a pistol as a weapon. The opinion states the facts.

Gallagher & Newton, for plaintiff in error.

Henderson, Attorney-General, *contra*.

ENGLISH, C. J. Alfred Fife, the plaintiff in error, was charged before a justice of the peace of Jefferson county, with carrying a pistol as a weapon, contrary to the act of 16th February, 1875, convicted and appealed to the Circuit Court, where he was tried anew, and again found guilty; moved for a new trial, which was refused; final judgment rendered against him for the fine imposed by the jury, and he brought error.

One witness testified, on the trial, that he was walking down a street in Pine Bluff, about the 17th of September, 1875, when he met plaintiff in company with one Terry, near Trulock's bank. Plaintiff had a banjo under his left arm, and a pistol in his hand.

Witness spoke to Terry, when plaintiff raised his pistol, and asked him what he said. Witness replied that he was talking to Terry. Plaintiff laid the guard of his pistol, which he held in his hand, against the face of witness, and said that, meaning the pistol, ruled the world, to which witness replied: "Yes, it did." Witness saw the pistol and thought it was a revolver.

On the same day, perhaps, another witness saw plaintiff in a drug store, with a pistol in his hand. He did not notice it particularly, but thought it was a revolver.

On the evening of the same day plaintiff was playing cards in a saloon, when an intoxicated man came in, and plaintiff undertook to put him out. They clenched and fell behind a screen. After the difficulty was over, the saloon keeper found on the floor the cylinder of a pistol, but he saw plaintiff with no pistol.

It is probable, from all the evidence, that the plaintiff was carrying a pocket revolver.

It is submitted for the plaintiff that the act under which he was convicted is in conflict with art. II, Amendments to the Constitution of the United States, and sec. 5 of the Declaration of Rights of the Constitution of 1874.

The act provides:

"That any person who shall wear or carry any pistol of any kind whatever, or any dirk, butcher or Bowie knife, or sword or spear in a cane, brass or metal knucks, or razor, as a weapon, shall be adjudged guilty of a misdemeanor, etc., etc. *Provided*, that nothing herein contained shall be so construed as to prohibit any person wearing or carrying any weapon aforesaid on his own premises; or to prohibit persons traveling through the country, carrying such weapons while on a journey, with their baggage, or to prohibit any officer of the law wearing or carrying such weapons when engaged in the discharge of his official duties; or any person summoned by such officer to assist in the execution of any legal process, or any private person legally authorized to execute any legal process to him directed." Sec. 1, act February 16th, 1875. Pamph. 1874–5, p. 155.

Article 2, Amendments to the Constitution of the United States, declares that: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

Judge STORY, commenting on this clause of the Constitution,

said: "The importance of this article will scarcely be doubted, etc. The militia is the natural defense of a free country against sudden foreign invasion, domestic insurrection, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended, and the facile means which they afford the ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." 2 Story on the Const., §§ 1896–7.

Mr. Cooley remarks upon the same article: "Among the other defenses to personal liberty should be mentioned the right of the people to keep and bear arms. A standing army is peculiarly obnoxious in any free government, etc. The alternative to a standing army is a well-regulated militia, but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts." Const. Lim. 350.

It is manifest from the language of the article, and from the expressions of these learned commentators, that the arms which it guarantees American citizens the right to keep and to bear, are such as are needful to, and ordinarily used by a well-regulated militia, and such as are necessary and suitable to a free people, to enable them to resist oppression, prevent usurpation, repel invasion, etc., etc.

This article, however, is a restraint upon Federal, and not upon State legislation. *Andrews* v. *The State*, 3 Heisk. 165; s. c., 8 Am. Rep. 8; *Barron* v. *City Council of Baltimore*, 7 Peters, 243; *Fox* v. *Ohio*, 5 How. (U. S.) 434; *Smith* v. *Maryland*, 18 id. 71; *Withers* v. *Buckley*, 20 id. 84; *Twitchell* v. *Commonwealth*, 7 Wall. 321.

Sec. 5, art. II of the present Constitution of this State, declares that: "The citizens of this State shall have the right to keep and bear arms for their common defense."

There was a similar clause in the Bill of Rights of the Constitution of 1836; and in *The State* v. *Buzzard*, 4 Ark. 18, this court

held, in effect, that it and the second article of the Amendments to the Constitution of the United States had a common purpose, and that the act prohibiting the wearing of concealed weapons was in conflict with neither of them. See Gantt's Digest, § 1517.

In *Aymette* v. *State*, 2 Humph. 158, Judge GREEN said: "As the object, for which the right to keep and bear arms is secured, is of a general nature, to be exercised by the people in a body for their common defense, so the arms — the right to keep which is secured — are such as are usually employed in civil warfare, and constitute the ordinary military equipments. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights, etc. * *

* The legislature, therefore, have the right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, and would not contribute to the common defense."

Mr. Bishop, treating of the provision of the Constitution of the United States which secures to the people the right to keep and bear arms, says: "If we look to this question in the light of judicial reason, without the aid of specific authority, we shall be led to the conclusion, that the provision protects only the right to keep such arms as are used for purposes of war, in distinction from those which are employed in quarrels and brawls and fights between maddened individuals, since such, only, are properly known by the name of arms, and such, only, are adapted to promote the security of a free State. In like manner, the right to bear arms refers merely to the military way of using them, not to their use in bravado and affray." 2 Crim. Law, § 124.

By the Constitution of Tennessee (1870), "The citizens of this State have a right to keep and bear arms for their common defense."

In *Andrews* v. *State*, 3 Heisk. 165; s. c., 8 Am. Rep. 8, an act prohibiting any person from carrying, publicly or privately, a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver, with a provision for exceptional cases, as in our act, was held to be constitutional.

Judge FREEMAN, who delivered the opinion of the court, after showing that the object of the second article of the amendments to the Constitution of the United States, and that of the clause of the Constitution of Tennessee above copied, was the same, said: "In order to arrive at what is meant by this clause of the State

Constitution, we must look at the nature of the thing itself, the right to keep which is guaranteed. It is 'arms,' that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted to the ends indicated above, that is, the efficiency of the citizen as a soldier, when called on to make good the defense of a free people; and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus to use? Not every thing that may be useful for offense or defense, but what may properly be included or understood under the title of 'arms,' taken in connection with the fact that the citizen is to keep them, as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle, of all descriptions, the shot gun, the musket and repeater, are such arms, and that, under the Constitution, the right to keep such arms cannot be infringed or forbidden by the legislature. Their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured, and the necessary incidents to the exercise of such rights."

The learned judge might well have added to his list of war arms, the sword, though not such as are concealed in a cane.

By the word "repeater," we suppose the judge meant the army and navy repeaters, which, in recent warfare, have very generally superseded the old-fashioned holster, used as a weapon in the battles of our forefathers. He certainly did not mean the pocket revolver, for, in *Page* v. *The State*, 3 Heisk. 198, the same court held that Page was properly convicted for carrying such pistol. NICHOLSON, J., who delivered the opinion of the court, said: "The evidence fully establishes the fact that the pistol carried by Page (a pistol called a revolver, about eight inches long) was not an arm for war purposes, and, therefore, under the ruling of this court, in the case of *Andrews* v. *The State*, the carrying of which the legislature could constitutionally prohibit."

Our act prohibits the carrying, as a weapon, "any pistol of any kind whatever," with provisions for exceptional cases.

Pistol is from *Pistola*, a town in Italy, where pistols were first made. A pistol is a small fire-arm, or the smallest fire-arm used, intended to be fired from one hand, differing from a musket chiefly in size. Pistols were introduced into England in the year 1521. Webster.

In the act the pistol is associated, in the prohibited list of weapons, with the dirk, butcher or Bowie knife, the sword or spear in a cane, brass or metal knucks, and the razor.

From the company in which the pistol is placed, and the known public mischief which the legislature intended by the act to prevent, it is manifest that the pistol intended to be proscribed is such as is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls, and not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for "the common defense."

The indications in the evidence are, that the plaintiff in error was carrying a pistol of that class or character intended to be prohibited by the legislature, and which we think may be prohibited, in the exercise of the police power of the State, without any infringement of the constitutional right of the citizens of the State to keep and bear arms for their common defense.

The only point made for the plaintiff in error by his counsel here is, that the whole act is unconstitutional, and we think, when properly construed, it is not in conflict with the Constitution, and that the judgment of the court below should be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — See, also, *Andrews* v. *State*, 8 Am. Rep. 8, and note; *English* v. *State*, 14 id. 374, and note; *Carroll* v. *State*, 18 id. 538.

The constitutionality of the laws against carrying concealed weapons has been repeatedly affirmed. In *State* v. *Jumel*, 13 La. Ann. 399, it is said to be "a measure of police, prohibiting only a particular mode of bearing arms, which is found dangerous to the peace of society." See *State* v. *Mitchell*, 3 Blackf. 229. *Aymette* v. *State*, 2 Humph. 154, was an indictment for carrying a Bowie knife, and the court, holding the same doctrine, lay stress on the point that the instrument was "not usual in civilized warfare."

"To hold that the legislature could pass no law upon this subject, by which to preserve the public peace, and protect our citizens from the terror which a wanton or unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself." This case is an elaborate discussion of the subject, as is *Nunn* v. *Georgia*, 1 Ga. 243, holding the same doctrine. See, also, *Wright* v. *Commonwealth*, 77 Penn. St. 470. In *State* v. *Buzzard*, 4 Ark. 18, the court in long and well-considered