

all or any of the obligors having ten days' notice."

The law, with respect to damages when the claim is interposed for delay, was changed by the second section of the act of 1821; (Aiken's Digest, 168, sec. 46) by this act the

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jury is authorized, in such a case, to give damages not exceeding fifteen per centum.

It will be seen that the act recited does not authorize any judgment against the securities, either for the costs or damages assessed against the claimant; and it seems evident that no summary mode of proceeding on the bond required to be given on the making the claim, was contemplated by the Legislature, because a different bond is required to be given, to secure the forthcoming of the property, if the claim should be decided against the claimant, and on this only a summary remedy is given, similar to that which obtains in the case of ordinary delivery bonds.

The act of 1828, (Aiken's Digest, 169, 170.) repealed so much of the act of 1812, as required two bonds to be given, and provided, "that the sheriff should prepare a bond, whenever property levied on by him, should be claimed and affidavit made, and good security offered for the trial of the right thereof." This bond is to be made payable to the plaintiff in execution, and conditioned for the forthcoming of the property, if the same be found liable to the execution, and for the payment of such costs and damages as shall be recovered for putting in the claim for delay. This act, also provides, that if the claimant shall fail to deliver the property found subject to the execution, to the sheriff, it shall be his duty to go to the clerk and endorse such failure on the bond, by him returned, whereupon such bond shall have the force of a judgment, and the clerk shall issue execution against the claimant and his securities for the value of the property not delivered, as assessed by the jury, with interest from the date of the verdict.

Although the act of 1828, consolidates the two bonds previously required by the act of 1812, yet, it introduces no change in the mode by which the securities are made chargeable, if the costs and damages assessed against the claimant, remain unpaid. The bond is to have the effect of a judgment only, in the event of a failure to deliver the property found, subject to the execution; and the summary process of execution against the securities, is authorized only on this failure.

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*2. If the judgment against the claimant for the costs and damages, cannot be enforced by the ordinary process of execution, or is not paid, the bond can be prosecuted in the ordinary form by suit, and redress had against the claimant's securities, in this manner; but a judgment against them, on the verdict of the jury, in the trial of the

right of property, is not warranted by any of the statutes in force.

The judgment of the circuit court is reversed, and the proper judgment directed to be entered against the claimant only, for the costs and damages.

1 Ala. 612.

THE STATE v. REID.

1. The act of the 1st of February, 1839. "To suppress the evil practice of carrying weapons secretly," does not either directly, or indirectly tend to divest the citizen of the "right to bear arms in defence of himself and the State;" and is, therefore consistent with the 23d section of the 1 Art. of the constitution.

[Cited in Shelton v. Mayor of Mobile, 30 Ala. 541, 68 Am. Dec. 143; Owen v. State, 31 Ala. 389; Lockett v. State, 47 Ala. 44; Wright's Heirs v. Ware, 50 Ala. 556; Dunston v. State, 124 Ala. 90, 27 South. 333, 82 Am. St. Rep. 152.]

[See 48 Cent. Dig. Weapons, § 3.]

[2. Cited in Wright's Heirs v. Ware, 50 Ala. 555, to the point that a state constitution is not a grant of power, but an instrument of restraint and limitation upon power already plenary, so far as it respects the functions of government and the objects of legislation.]

The defendant was indicted in the Circuit Court of Montgomery, for carrying concealed about his person, a certain species of fire arms, called a "pistol," contrary to the form of the statute, &c. To which he pleaded not guilty. Thereupon the case was submitted to a jury, who found the defendant guilty, and assessed a fine against him, of fifty dollars, for which sum the court rendered a judgment, and directed that he be imprisoned in the common jail, for the space of six hours, and thereafter until the fine and costs were paid.

On the trial it was proved, that the defendant carried concealed about his person, a pistol. That while making a settlement as sheriff, he had been attacked by an individual of a dangerous and desperate character,

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who afterwards threatened his person, *and came to his office several times to look for him. It was also proved, that these threats were communicated to the defendant, and the pistol brought to him by a friend, who conceived his life was in danger.

The defendant thereupon moved the court, to charge the jury, that the law on which the indictment was founded was unconstitutional, and that the defendant could not be convicted; which charge was refused by the court. The defendant then moved the court, to charge the jury, that if they believed from the evidence that the defendant carried the weapon concealed, for the purpose of defending his person, and that it was necessary to carry the weapon concealed for that purpose, then, they should acquit the defendant, which charge was also refused. Whereupon the

court charged the jury, that the law upon which the indictment was founded, was constitutional, and that although the jury might believe from the evidence, that the defendant carried the weapon for the defence of his person, and although it was necessary for his defence that the weapon should be concealed, yet these facts would only go in mitigation, and did not constitute a complete defence. Which charge, as well as the refusal to give the several charges asked for, were at the request of the defendant referred to this court for its decision, as presenting novel and difficult questions of law.

The defendant then moved in arrest of judgment, on the ground, that the statute on which the indictment was founded was unconstitutional, which motion was overruled by the court, and the question of law thereupon arising referred to this court, as novel and difficult.

The Attorney General for the State, argued that it was competent for the Legislature to prohibit the wearing of concealed weapons, that such a law did not conflict with the constitutional provision, which guaranteed to the citizen the right to bear arms in the defence of himself and the State. That the statute under which the defendant was convicted, did not impair that right, while it proposed to discountenance by punishment, a practice which had been greatly promotive of

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violence and bloodshed. *Every man was still left free to carry arms openly, the only manner in which they could be used for defensive purposes.

Mr. Goldthwaite for the defendant, insisted that the act of the Legislature on which the indictment was founded, abridges the right secured to the citizen by the 23d section of the 1st article of the constitution. There is no restriction on the exercise of the right, and as the grant is in general terms, the Legislature cannot prescribe limits to it. 1 Story on Con. 407-8: *Sturgus v. Crowninshield*, 4 Wheat. Rep. 102-202: *Bliss v. Commonwealth*, 2 Litt. Rep. 90. Has not a subsequent Legislature (if the statute in question be constitutional) the right to prohibit the carrying of arms openly, and both acts being in force, the right of carrying arms at all, would be taken away. Such a state of things, all will admit, cannot exist without a violation of the constitution.

The constitution of the United States, provides that the liberty of the press shall not be abridged. The authorities are clear that no previous restraint shall be imposed upon publications. 3 Story on Con. 736. The party publishing is responsible for the abuse of the liberty. 3 Story on Con. 742. So in regard to the bearing of arms, the person making an improper use of them is amenable to the laws, though he may carry them in any manner he pleases.

COLLIER, C. J.—By the first section of the act, "to suppress the evil practice of carrying weapons secretly," (Acts of 1833-9) it is enacted, "that if any persons shall carry concealed about his person, any species of fire arms, or any Bowie knife, Arkansasaw tooth pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending, shall on conviction thereof, before any court having competent jurisdiction, pay a fine not less than fifty nor more than five hundred dollars, to be assessed by the jury trying the case; and be imprisoned for a term not exceeding three months, at the discretion of the judge of said court." Under this section the defendant was indicted, and he insists that it is repugnant to the constitution of this State, which declares that,

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"Every citizen *has a right to bear arms, in defence of himself and the State," 23d sec. 1 Art. of the Con. and is, therefore, inoperative and void.

A provision similar to that, with which the statute in question is said to come in collision, is contained in the constitutions of several of the States, and was doubtless suggested by the "Bill of Rights" of the 1 W. and M. which embodies many provisions in favor of the liberty of the subject, and is said to be for the most part, in affirmance of the common law. That enactment after declaring it against law, to raise or keep a standing army in the kingdom in time of peace, without the consent of Parliament, declares "that the subjects which are Protestants may have arms for their Defence, suitable to their Conditions and as allowed by law." 6 vol. Statutes of the Realm, 143: *Crabb's Eng. Law*, 570.

The bill of rights was doubtless induced by the high prerogative claims of the Stuarts, even after the restoration of Chas. the II. but more especially by the extraordinary assumptions of Jas. the II., by which he attempted to assail the liberties and religion of the people, and to render inefficient the enactments of Parliament, by the exercise of a dispensing power.

The bill of rights, among other things confirms the declaration of rights, to which the Prince of Orange yielded his assent in the presence of both houses of Parliament, upon ascending the throne. That instrument recited the illegal and arbitrary acts committed by the late King, and declared almost in the terms of the recital, that such acts were illegal. The evil which was intended to be remedied by the provision quoted, was a denial of the right of Protestants to have arms for their defence, and not an inhibition to wear them secretly. Such being the mischief, the remedy must be construed only to extend so far as to effect its removal.

We have taken this brief notice of the English statute, as it may serve to aid us in the construction of our constitutional provision, which secures to the citizen the right to bear arms.

It was argued for the defendant that,

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where the constitution *grants a power, it must be understood to grant it entire; and in such a case, it will be incompetent for the Legislature to enact a law in derogation of it. The constitutional provision which we are to examine, cannot be considered as conferring either upon the Legislature, or the people any new or additional authority. The constitution of a State, is an instrument of restraint and limitation upon powers already primary, so far as it respects the functions of government and the objects of legislation. We are then, to regard the provision in question, as a guaranty to the people of the right to bear arms, "in defence of themselves and the State," and an inhibition upon the Legislature to divest it by any enactment.

The question recurs, does the act, "To suppress the evil practice of carrying weapons secretly," trench upon the constitutional rights of the citizen? We think not. The constitution in declaring that, "Every citizen has the right to bear arms in defence of himself and the State," has neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne. The right guarantied to the citizen, is not to bear arms upon all occasions and in all places, but merely "in defence of himself and the State." The terms in which this provision is phrased seems to us, necessarily to leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals. The statute of 1 Wm. and M. while it declares the right of the subject, it refers to Parliament to determine what arms shall be borne and how; while our constitution being silent as to the action of the Legislature, does not divest it of a power over the subject, which pertained to it independent of an express grant.

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for

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the purpose of defence, would be clearly *unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.

We are aware that the court of Appeals of Kentucky, in *Bliss v. Commonwealth*, 2 Litt. 90 [13 Am. Dec. 251], attained a con-

clusion seemingly the opposite of that to which our judgments incline. In that case, the appellant was indicted under a statute which is in these words, "That any person in this commonwealth who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars; which may be recovered in any court having jurisdiction of like sums, by action of debt or on the presentment of a grand jury; and a prosecutor in such presentment shall not be necessary. One half of such fine shall be to the use of the informer, and the other to the use of this commonwealth." The twenty-third section of the tenth article of the constitution of Kentucky, provides "that the right of the citizens to bear arms in defence of themselves and the State, shall not be questioned;" and the question before the court was, did the act of the Legislature impugn the right secured by the constitution?

The court considered that the right to bear arms, existed without any restriction, at the adoption of the constitution, and that the right of the "citizen" was as directly assailed by the provisions of the statute, as though they were forbid carrying guns on their shoulders, swords in scabbards, or when in conflict with an enemy were not allowed the use of bayonets. "If the act be consistent with the constitution" say the court, "it cannot be incompatible with that instrument, for the Legislature by successive enactments, to entirely cut off the exercise of the right of the citizens to bear arms. For in principle, there is no difference between a law prohibiting the wearing

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concealed arms, and *a law prohibiting the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.

"We may possibly be told, that though a law of either description may be enacted consistently with the constitution, it would be incompatible with that instrument, to enact laws of both descriptions. But if either, when alone, be consistent with the constitution, which, it may be asked, would be incompatible with that instrument, if both were enacted?"

"The law first enacted would not be; for as the argument supposes, either may be enacted consistent with the constitution, that which is first enacted must, at the time of enactment, be consistent with the constitution; and if then consistent, it cannot become otherwise by any subsequent act of the Legislature. It must, therefore, be the latter act, which the argument infers would be incompatible with the constitution.

"But suppose the order of enactment was reversed, and instead of being the first, that which was first, had been the last; the argument to be consistent should, never-

theless, insist on the last enactment being in conflict with the constitution. So that the absurd consequence would thence follow, of making the same act of the Legislature, either consistent with the constitution, or not so, according as it may precede or follow some other enactment of a different import. Besides, by insisting on the previous act producing any effect on the latter, the argument implies, that the previous one operates as a partial restraint on the right of the citizens to bear arms, and proceeds on the notion, that by prohibiting the exercise of the residue of right not affected by the first act, the latter act comes in collision with the constitution. But it should not be forgotten, that it is not only a part of the right that is secured by the constitution; it is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it may be done, it is equally forbidden by the constitution."

We have thought it proper to state thus at

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length, the argument employed by the court, in *Bliss v. Commonwealth*, because it places in a very strong point of view, the objection to the statute we are called on to examine. Whether the peculiar terms employed in the Kentucky constitution, viz: "That the right of the citizens to bear arms, &c. shall not be questioned," influenced to any extent, the conclusion of the court, that the right could not be regulated, but must remain as it was at the time of its adoption, we are not prepared to say. Yet we are strongly inclined to believe, that the inhibition to question the right, was regarded as more potent than a mere affirmative declaration, intended to secure it to the citizen; and that while the one amounted to a denial of the right to legislate on the subject, the other would tolerate legislation to any extent which did not actually or in its consequences destroy the right to bear arms.

But the court say that it is a matter which will not admit of legislative regulation, and in order to test the correctness of its opinion, supposes one Legislature to prohibit the bearing arms secretly, and a subsequent Legislature to enact a law against bearing them openly; and then asks the question, whether the first, or last enactment would be unconstitutional. Under the provision of our constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.

In respect to the two prohibitory enactments, supposed by the court of Appeals of Kentucky, we should be disposed to think, if either one, when standing alone, would be

constitutional, that the last would be regarded as an expression of the will of the Legislature when enacted, and as it could not operate in harmony with the first, would by implication, repeal it. This view, we think, accords with the decision of the supreme court of the United States, in *Sturges v. Crowninshield*, 4 Wheat. 122 [4 L. Ed. 529], in which the question arose, whether the Legislature of a State, possessed the constitutional right to enact a bankrupt law, inasmuch as the power to establish a general

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bankrupt law was conferred upon Congress, by the constitution of the United States. The court were of opinion, that the right to adopt such a measure pertained to the Legislatures of the States, previous to the ratification of the Federal constitution, and that the insertion in that instrument, of an affirmative grant of power to Congress to legislate on the subject, did not ipso facto, divest the pre-existent right of the States, until Congress had exercised the power conferred; but when this was done then the local laws would become inoperative.

Without further noticing the case of *Bliss v. Commonwealth*, it may be proper to remark, that it received the assent of but two of the judges of the court of appeals, while it was dissented from by the third.

In *The State v. Mitchell*, 3 Blackf. 229, it appears that the defendant was indicted under a section of a statute of Indiana, which is as follows: "That every person, not being a traveller, who shall wear or carry any dirk, pistol, sword in a cane, or other dangerous weapon concealed, shall upon conviction thereof, be fined in any sum not exceeding one hundred dollars." Laws of Indiana, ed. of 1831, p. 192. It was insisted that this enactment was opposed to the constitution of Indiana, which declares "that the people have a right to bear arms for the defence of themselves and the State;" but the court decided against the objection, and held the act to be constitutional.

The difference, between the terms used in the constitution of Indiana, and that of our own State, is so entirely immaterial, that it could not possibly authorize a difference of construction.

The cases cited, are the only adjudications we have been able to find, in regard to the right of the people to bear arms; and while the one sustains the constitutionality of the enactment in question, the other does not disprove it. But let it be conceded that it is doubtful, whether the statute does not come in collision with the constitution, yet it is our duty to maintain its validity. It has received the assent of the two houses of the General Assembly and the Governor, under a solemn pledge to support the constitution; and their opinion is at least, prima

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facie evidence, that they have not overstepped the limits of legislative competency. Be-

fore the judiciary can with propriety declare an act of the Legislature unconstitutional, a case should be presented in which there is no rational doubt. *Bank of Newbern v. Taylor*, 4 N. C. 20; *Ex parte McCollum*, 1 Cow. R. 450.

It appears from the case as referred to this court, that the defendant moved the circuit judge "to charge the jury, that if they believed from the evidence, that the defendant carried the weapon concealed for the purpose of defending his person, and that it was necessary to carry the weapon concealed for that purpose, then, they should acquit the defendant; which charge was also refused." There was no evidence adduced, tending to show that the defendant could not have defended himself as successfully, by carrying the pistol openly, as by secreting it about his person: it is difficult to conceive, how one could be placed in such an attitude, consistently with the law which recognizes the right of self-protection. If the emergency is pressing, there can be no necessity for concealing the weapon, and if the threatened violence will allow of it, the individual may be arrested and constrained to find sureties to keep the peace, or committed to jail. The charge asked for, was then upon an abstract point of law.

In the case at bar, the defendant needed no arms for his protection, his official authority furnished him an ample shield. In this country a sheriff possesses all the powers, which pertained to his office at common law; except so far as they may have been divested by statute, or such as are incompatible with the nature of our institutions. He is the keeper of the peace within the county. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may cause such persons to be bound in a recognizance to keep the peace. He may, and is bound *ex officio*, to pursue and take all traitors, murderers, felons, and rioters; he also hath the custody and safekeeping of the county jail; he is to defend the same against rioters, and for this purpose, as well as for taking rioters and others breaking the peace, he may call

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to his aid the posse comitatibus, or power of the county, and the citizens are bound to obey his summons, upon pain of fine and imprisonment. 1 Bla. Com. 343; *Watson's Shff.* 2.

We will not undertake to say, that if in any case, it should appear to be indispensable to the right of defense that arms should be carried concealed about the person, the act "to suppress the evil practice of carrying weapons secretly," should be so construed, as to operate a prohibition in such case. But in the present case, no such necessity seems to have existed; and we cannot well conceive of its existence under any supposable circumstances.

We have only to add, that the judgment of the circuit court of Montgomery, is affirmed.

1 Ala. 622.

CLEMENS v. LOGGINS.

1. A vendee of land may tender the purchase money according to his contract, and demand title, and if the vendor refuse to make title, he may rescind the contract.

[Cited in *Clay v. Dennis*, 3 Ala. 377; *Reid v. Davis*, 4 Ala. 86; *Duncan v. Jeter*, 5 Ala. 607, 39 Am. Dec. 342; *Magee v. McMillan*, 30 Ala. 421; *Greene v. Allen*, 32 Ala. 221; *Kelly's Heirs v. Allen*, 34 Ala. 670.]

2. But the mere abandonment of possession without such tender, demand of title and refusal, will be no defence when sued for the purchase-money.

[Cited in *Reid v. Davis*, 4 Ala. 86; *Duncan v. Jeter*, 5 Ala. 607, 39 Am. Dec. 342; *Perkins' Exrs v. Winter's Adm'x & Heirs*, 7 Ala. 868; *Griggs v. Woodruff*, 14 Ala. 19; *Gallagher v. Witherington*, 29 Ala. 422.]

[See 48 Cent. Dig. Vendor and Purchaser, § 868.]

3. It is no defence to an action for the purchase money of land, that the vendor has no title, the vendee retaining the possession.

[Cited in *Clay v. Dennis*, 3 Ala. 377; *Perkins' Exrs v. Winter's Adm'x & Heirs*, 7 Ala. 868; *Helvenstein v. Higgason*, 35 Ala. 263; *Jones v. State*, 100 Ala. 216, 14 South. 115.]

4. When the vendee is sued by the assignee of the vendor, on a note given for the purchase money, he cannot prove by the declarations of the vendor, that he had no title to the land, as the vendor might have been examined as a witness for the vendee.

[See 20 Cent. Dig. Evidence, § 463.]

5. A promise, by the maker of a note, to the assignee after the assignment, that he will pay it, will not preclude him from making any defence, which existed previous to notice of the assignment; such promise being without consideration.

[Cited in *McCaleb v. Price*, 12 Ala. 755; *Ware, Murphy & Co. v. Morgan*, 67 Ala. 463; *Foster v. Bush*, 104 Ala. 668, 16 South. 625.]

[See 7 Cent. Dig. Bills and Notes, § 767.]

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*6. When the evidence in a cause is conflicting, the court cannot charge the jury, that if they believe the evidence, they must find for the plaintiffs.

[Cited in *Thompson v. State*, 21 Ala. 56.]

[See 46 Cent. Dig. Trial, § 413.]

Error to the Circuit Court of Tuscaloosa County.

The action was assumpsit on two promissory notes, for two hundred dollars each, made by the defendant in error, to one Obadiah Cooper, and by him assigned to the plaintiff in error.

On the plea of non assumpsit, the defendant had judgment.

From a bill of exceptions taken on the trial below, it appears that one Cotton had purchased a tract of land of Cooper, the plaintiff's assignee, on credit, and received a bond for title; that being unable to comply with