

TENNESSEE SUPREME COURT
REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Tennessee

FOR THE YEARS

1871-2.

JOSEPH B. HEISKELL,

REPORTER,

VOLUME III

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BY
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at the evils intended to be checked, and offenses forbidden by this act, and turn to the proof in this case, and see the character of acts shown to have been committed by some one, we feel no hesitancy in saying, that whenever parties shall be regularly convicted after a fair and impartial trial, in accordance with the forms of law, of such offenses, we shall feel no hesitancy in enforcing sternly the penalties provided by the statute.

Every home in this State is entitled to be protected from intrusion and outrage, whether it be the mansion [165] of the wealthy or the hovel of the poorest man in the land.

It should be the pride and boast of every citizen to make the law so effective in its protective power, that we may be able to say of our country, as Canning said of the peasant homes of England, "that the winds and rains may enter them, but, without the warrant of law, the King dare not do it." We can only attain this desirable end by punishing promptly and severely all who shall dare, in violation of law, to intrude upon the sanctities of that place in which no forbidden or uninvited foot should ever be permitted to tread.

Note.—The case was reversed on other points.

[Reporter.]

James Andrews v. The State, The State v. Frank O'Toole, and The State v. Elbert Custer.

1. CARRYING ARMS. *Constitution.* The Act of 1870, c. 13, to prohibit the carrying of deadly weapons, is constitutional.
2. CONSTITUTIONAL LAW. *Constitution of U. S. Amendments not restrictions on States.* The Constitution of the United States, Art. 2, of Amendments, declaring the right of the citizen to bear arms, is a restriction alone upon the United States, and has no application to the State Governments.

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3. **SAME.** *Right to bear arms. Common defense.* The right to bear arms for the common defense does not mean the right to bear them ordinarily [166] or commonly, for individual defense, but has reference to the right to bear arms for the defense of the community against invasion or oppression.
4. **SAME.** *Same. Right to keep and use.* The citizen has, at all times, the right to keep the arms of modern warfare, and to use them in such manner as they may be capable of being used, without annoyance and hurt to others, in order that he may be trained and efficient in their use.
5. **SAME.** *Same. Same. Regulations of. Arms of warfare.* The right to keep arms of warfare can not be prohibited by the Legislature under the permissive clause of the Constitution of 1870, allowing the Legislature to regulate "wearing" of arms. The use of such arms may be restricted as to manner, time or place, due regard being had to the right to keep and bear, for the constitutional purpose, but can not be prohibited.
6. **SAME.** *Right to prohibit other arms.* The right to keep or bear other arms, not being protected by the Constitution, may be absolutely prohibited.

[Cited in: 7 Bax., 60; 1 Lea, 716; 12 Pickle, 247.]

FROM GIBSON, CARROLL AND HENRY.

The case of The State v. Andrews, was tried in the Circuit Court of Gibson County, at February Term, 1871, before GID. B. BLACK, J., and upon a conviction, defendant appealed.

O'Toole was indicted in the Circuit Court of Carroll, where, at May Term, 1871, he moved to quash before James D. Porter, J., on the ground that the Act of 1870, c. 13, was unconstitutional, and because the indictment did not charge that the pistol was a belt pistol, or pocket pistol. The indictment being quashed on both grounds,

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the District Attorney, J. D. Dunlap, appealed to this Court.

Custer was indicted in the Circuit Court for Henry county, at September Term, 1870; and at January Term, 1871, J. D. Porter, J., presiding, defendant submitted, [167] was fined, and ordered to be imprisoned. Thereupon, the District Attorney, Dunlap, moved that he be required to give sureties to keep the peace, which being refused, he appealed for the State.

Alvin Hawkins, for Andrews and O'Toole, insisted that, by Article 2 of the amendments to the Constitution of the United States, the right to bear arms was protected. Also by Art. 1, s. 26, of the Constitution of 1834. He relied on *Aymette v. The State*, 2 Hum., 154; cited the Constitution of 1870, Art. 1, s. 26; insisted that the power to regulate did not involve the power to prohibit, and that this act was a prohibition. That in *Aymette's* case the arms carried were not arms of warfare, the wearing of which the Legislature had the power to prohibit; that this is the only point decided in that case—all else is *dictum*. He insisted that the words relied upon by Judge Green as restrictive, *i. e.*, "for the common defense," could not be of any effect, as the right was guaranteed without any such restriction in the Constitution of the United States; that the necessity was not only to keep them at all times, but to be inured to their use by constantly bearing them about with them; that the power in the Constitution of 1870 to regulate the wearing of arms, implies a right to wear as well as to bear arms, and that this right was subject only to be regulated, not destroyed.

J. N. Thomason, for Custer, insisted that the indictment was bad, for not showing what sort of pistol was

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carried. He insisted upon the protection of the Constitution of the United States, and of the State, and that [168] the Legislature had no power over the arms of civilized warfare, but might prohibit the carrying of other arms.

Attorney General Heiskell, for the State, insisted that Article 2, of the amendments to the Constitution of the United States had no application to States; that it was an imputation on the statesmanship of any convention to suppose that they meant to put a constitutional limitation on the power of the people to restrict the privilege (curse) of carrying deadly weapons. Aymett's case negatives this construction, and puts on it a meaning worthy of statesmen, protecting rights of freemen, not of ruffians and cut-throats. To attribute to the Convention of 1870, such an intention, in view of the state of things then existing, would be to impute to them utter incapacity. The Constitution of 1870 contains an express power to regulate the wearing of arms, not to regulate the mode, but the thing, the subject; equivalent to adopt rules concerning, to pass laws relative to. To regulate is not necessarily to permit. Regulations are simply rules. Rules concerning a thing may be mandatory, directory, restrictive or prohibitory—affecting the mode or going to the substance. If they can not prohibit carrying arms, they may, by regulation, determine what arms may be carried, what shall be proscribed; may declare where they may be carried, and when they may be carried, as well as declare the mode. If weapons of warfare are protected by the Constitution, still they are subject, by the exception, to regulation in respect to times, places and modes. In this act they restrict the time to journeys out of the county, but do not restrict the mode.

[169] The legislative power is the power of the whole people, acting by their representatives. If they choose in

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that mode, to declare their willingness to part with a portion of their own liberty, in order that by the same law the evil minded may be restrained, who shall say nay? In the exercise of this great power by the people, they are not to be held to have tied their own hands, except where the Constitution makes it clear that they so intended.

The protection of minorities is one object of constitutional provisions. The protection of majorities is committed to the Legislature. They may protect themselves from the diabolical minorities by any act to which they are willing to submit themselves. The courts will not strain the Constitution to restrain legislation, but in a doubtful case will defer to the legislative judgment.

In the case of *Aymette v. The State*, Judge Green takes a proper view of the Constitution. In Alabama, about the same time, the same view was taken in the case of *The State v. Reid*, 1 Ala., 612. In each the Constitution is treated as an instrument worthy of statesmen, and construed in the light of History; but in both there are points which will not bear critical examination. These cases strike out the true principle that it is the bearing of arms, not for private broils and purposes of blood, but in defense of a common cause; as citizen soldiers bearing arms for the defense, in common with each other; not commonly; i. e., on ordinary occasions. They looked to history for the occasions when the people met, bearing arms for the common defense; when they extorted from King John the great charter; when they vanquished Charles I; when they dethroned James II. They refer [170] to the laws to restrict carrying arms in certain places, and to certain persons, which gave rise to no complaint, remonstrance or repeal; they refer to laws by which communities and classes were disarmed by discriminating regulations; and such laws were declared against, but in the very declaration, the right to legislate on the subject, is

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recognized. It was this great political right that our fathers aimed to protect; not the claims of the assassin and the cut-throat to carry the implements of his trade. They would as soon have protected the burglar's jimmy and skeleton key.

The keeping of arms is protected, but that right is not infringed by this law. The citizen may keep arms in his house, may carry them about his own premises, may buy and carry them home, may take them to have them repaired. This is not carrying them in the sense of the statute. Of a porter carrying a box of pistols in his wheelbarrow or on his shoulder, we would not say he carries arms; of a man carrying the separated parts of a pistol in a basket or bundle, we would not say he carries a pistol. The statute is to have a reasonable construction. "Carry arms" is a military command. To carry arms, or to bear arms, is something different from merely supporting the weight, or removing from place to place.

The clause in the Constitution of 1870 was introduced to avoid controversy over the adverse views in the cases of Simpson and of Aymette, not to imply anything.

FREEMAN, J., delivered the opinion of the Court.

The questions presented for our decision in these cases, involve an adjudication of the constitutionality of [171] the act of the Legislature of Tennessee, passed June 11, 1870, entitled "An act to preserve the peace and prevent homicide."

The first section provides, "that it shall not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver. Any person guilty of a violation of this section shall be subject to presentment or indictment, and on conviction, shall pay a fine of not less than ten, nor more than fifty dollars, and be imprisoned at the discretion of the court,

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for a period of not less than thirty days, nor more
than six months; and shall give bond in a sum not exceed-
ing one thousand dollars, to keep the peace for the next
six months after such conviction."

The second section imposes upon all the peace officers
of the State the duty of seeing this act enforced. The
third section makes certain exceptions in favor of officers
and policemen, while *bona fide* engaged in their official
duties in execution of process, or while searching for, or
engaged in arrest of criminals, and in favor of persons
bona fide assisting officers of the law, and persons on a
journey out of their county or State.

These are the leading provisions of this statute, and
present the points of attack made upon it in argument
at the bar.

It is first insisted, that it is in violation of, and repug-
nant to the second article of the Amendments to the Con-
stitution of the United States, which is, that "a well regu-
lated militia being necessary to the security of a free state,
the right of the people to keep and bear arms shall not be
infringed."

[172] On the other hand, it is maintained by the Attor-
ney General, that these amendments have no application
to the States, and spend their force by limiting the pow-
ers of the Federal Government; and are, in their nature
simple restraints imposed by the States upon the govern-
ment created by them, and therefore we can not look to
this article in order to test the validity of the acts in
question. Upon the face of this article, it might have
been plausibly insisted that it would have been operative
upon, and control the action of the State, as well as of
the Federal Government; and this position would appa-
rently be strengthened by the other provision of the
Constitution of the United States, Art. 6, s. 2, that "this
Constitution, and the laws of the United States which
shall be made in pursuance thereof, shall be the supreme

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law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. It will be seen, however, that it is the "Constitution, and laws made in pursuance thereof," that are the supreme law of the land, so that we are to turn to that instrument, and ascertain what, by its fair construction and exposition, was intended to be allowed or prohibited, and to what powers its limitations and restrictions were applicable.

With this view, we examine the question in reference to the proper application of the article of the amendment under consideration.

The case of *Barron v. The Mayor and City Council of the City of Baltimore*, 7 Pet., 465, Curtis' ed., presented the question of the taking of private property, by the corporation [173] of the city, as it was assumed for public use. It was insisted, in favor of the jurisdiction of the Supreme Court of the United States, to review the decision of the State court, that the case was within and arose under the provision of the Constitutional amendments, Art. 5, prohibiting the taking of private property for public use, without just compensation. That this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. The question was discussed with his usual ability, by Chief Justice Marshall, and he lays down the proposition: "That the Constitution was ordained and established by the people of the United States, for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States formed such a government for the United States as they supposed best adapted to their situation, and best calou-

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 ferred on this government were to be exercised by itself;
 and the limitations on power, if expressed in general
 terms, are naturally, and we think, necessarily applicable
 to the government created by the instrument. They are
 limitations of the power granted in the instrument itself;
 not of distinct governments, framed by different persons
 and for different purposes." The learned Judge, after
 arguing the question at some length, says: "If in every
 inhibition intended to act on State power, [174] in the orig-
 inal Constitution, words are employed to express that
 intent; some strong reason must be shown for departing
 from this safe and judicious course in framing the amend-
 ments, before that departure can be assumed." He then
 goes on to demonstrate that no such reason existed. He
 says: "Had the people of the several States, or any of
 them, required changes in their constitutions; had they
 required additional safeguards from the apprehended en-
 croachments of their particular governments, the remedy
 was in their own hands, and would have been applied by
 themselves. A convention would have been called by the
 discontented State, and the required improvements would
 have been made by itself. Had the framers of these
 amendments intended them to be limitations on the powers
 of the State governments, they would have imitated the
 framers of the original Constitution, and have expressed
 that intention."

The Court, therefore, held that the provision of the 5th
 amendment, declaring that private property shall not be
 taken for public use without just compensation, was in-
 tended solely as a limitation on the power of the Govern-
 ment of the United States, and was not applicable to legis-
 lation of the States. See, also, 5 Wal., 479-80, and numer-
 ous other cases decided by the Supreme Court of the
 United States, cited in note to case of Barron v. City of
 Baltimore, Curtis' ed., 468.

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We need cite no authority to sustain the proposition that, upon a question involving the construction of the Constitution of the United States, or the just power of that government under said Constitution, the [175] decisions of the United States are binding on this Court, as well as all other courts of the States.

The State Legislature is not, then, limited in its powers on this subject by this article of the Constitution of the United States; it is a limitation, whatever be its construction and meaning, upon the powers of the other government, ordained and established by the people of the States themselves, or their Conventions or Legislatures.

We come now to the Constitution of the State of Tennessee, and endeavor to see what restrictions or limitations the sovereign people of Tennessee have chosen to place upon themselves, in reference to this subject, for the general good.

First, it may be assumed as almost an axiom in our law, with reference to the Legislatures, or law-making body of the States, that there is no limitation upon their powers, except such as are found either in the Constitution of the United States, or of the State itself. Plenary power in the Legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power, is an exception: *Cooley*, Const. Lim., 88, 89; *People v. Draper*, 15 N. Y., 543.

We do not, however, hold the power of the Legislature to be supreme for all purposes, when not in terms prohibited by one or the other of these Constitutions. We find limitations upon the powers of State Legislature, as clearly defined by fair construction and implication, and as binding as if expressed in so many words.

The division or separation of the powers of government in our own States, between the three departments, [176] legislative, judicial and executive, involves restraint upon the action of the Legislature, that is imperative, and may,

be fairly arrived at with sufficient certainty by the application of the principle that it is the Legislature that is the law-making power. The well-settled common law definition of a law is, a rule of action prescribed by the law-making power. It must, then, of necessity, (subject to possible exceptions,) be an enactment operative in the future, in so far as it is to be a rule of action prescribed for the people of the State. No enactment of a Legislature can, in the nature of things, reach back, and control or give direction to an act already accomplished. It was complete from the moment of its birth, so to speak, and can not be influenced or affected by another act, subsequent in time.

This view, however, is only incidentally mentioned, as presenting a ground of limitation on the powers of State Legislatures.

The Constitution of Tennessee, of 1834, Art. 1, s. 24, of the Bill of Rights, is: "That the sure and certain defense of a free people is a well regulated militia; and as standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit; and that in all cases, the military shall be kept in strict subordination to the civil authority." Section 25 exempts citizens, except such as are in the army of the United States, or militia in actual service, from punishment by martial law. Then follows section 26, which provides "that the free white men of this State have a right to keep and bear arms for their common defense."

[177] Section 24, in the Constitution of 1870, is the same as in the Constitution of 1834.

Section 26 is: "That the citizens of this State have a right to keep and bear arms for their common defense. But the Legislature shall have power by law, to regulate the wearing of arms, with a view to prevent crime."

What is the fair and legitimate meaning of this clause

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of the Constitution, and what limitations does it impose on the power of the Legislature to regulate this right? is the question for our consideration.

What rights are guaranteed by the first clause of this sec., 26, "that the citizens have a right to keep and to bear arms for their common defense?" We may well look at any other clause of the same Constitution, or of the Constitution of the United States, that will serve to throw any light on the meaning of this clause. The first clause of section 24 says, "that the sure defense of a free people is a well-regulated militia." We then turn to Art. 2, of amendments to the Constitution of the United States, where we find the same principle laid down in this language: "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 abridged." We find that, necessarily, the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions; in the one, as we have shown, against infringement by the Federal Legislature, and in the other, by the Legislature of the State. What was the object held to be so desirable as to require that its attainment should be guaranteed by being inserted in the fundamental law of [178] the land? It was the efficiency of the people as soldiers, when called into actual service for the security of the State, as one end; and in order to this, they were to be allowed to keep arms. What, then, is involved in this right of keeping arms? It necessarily involves the right to purchase and use them in such a way as is usual, or to keep them for the ordinary purposes to which they are adapted; and as they are to be kept, evidently with a view that the citizens making up the yeomanry of the land, the body of the militia, shall become familiar with their use in times of peace, that they may the more efficiently use them in times of war: then the right to keep arms for this purpose involves the right to prac-

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tice their use, in order to attain to this efficiency. The right and use are guaranteed to the citizen, to be exercised and enjoyed in time of peace, in subordination to the general ends of civil society; but, as a right, to be maintained in all its fulness.

The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.

But farther than this, it must be held, that the right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in [179] times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Again, 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 defence 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 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

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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 would 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, can not 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 [180] 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 right.

What limitations, then, may the Legislature impose on the use of such arms, under the second clause of the 28th section, providing: "But the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime?"

In the case of *Aymette v. The State*, 2 Hum., 159, Judge Greene said, that, "the convention, in securing the public political right in question, did not intend to take away from the Legislature all power of regulating the social relations of the citizen upon this subject. It is true, it is somewhat difficult to draw the precise line where legislation must cease, and where the political right begins, but it is not difficult to state a case where the right of the Legislature would exist." This was said in reference to the clause of the Constitution of 1834.

The Convention of 1870, knowing that there had been differences of opinion on this question, have conferred on the Legislature in this added clause, the right to regulate the wearing of arms, with a view to prevent crime.

It is insisted by the Attorney General, as we under

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stand his argument,* that this clause confers power on the Legislature to prohibit absolutely the wearing of all and every kind of arms, under all circumstances. [181] To this we can not give our assent. The power to regulate, does not fairly mean the power to prohibit; on the contrary, to regulate, necessarily involves the existence of the thing or act to be regulated. When applied to conduct or the doing of a thing, it must, of necessity, mean some check upon, or direction given to that conduct or course of action, implying the act being performed, but subject to certain limitations or restraints, either as to manner of doing it, or time, or circumstances under which it is or may be done. Adopt the view of the Attorney General, and the Legislature may, if it chooses, arbitrarily prohibit the carrying all manner of arms, and then, there would be no act of the citizen to regulate.

But the power is given to regulate, with a view to prevent crime. The enactment of the Legislature on this subject, must be guided by, and restrained to this end, and bear some well defined relation to the prevention of crime, or else it is unauthorized by this clause of the Constitution.

It is insisted, however, by the Attorney General, that, if we hold the Legislature has no power to prohibit the wearing of arms absolutely, and hold that the right secured by the Constitution is a private right, and not a public political one, then the citizen may carry them at all times and under all circumstances. This does not follow by any means, as we think.

While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the [182] ordi-

*It will be seen, by reference to the argument, that the judge has not in this and the following paragraphs, caught its spirit with his wonted accuracy. And see p. 199 in note.

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nary mode in which used in the country, and at the usual times and places. Such restrictions are implied upon their use as are thus indicated.

Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them, nor necessary in order to his familiarity with them, and his training and efficiency in their use. As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances.

It is insisted by the Attorney General, that the right to keep and bear arms is a political, not a civil right. In this we think he fails to distinguish between the nature of the right to keep, and its necessary incidents, and the right to bear arms for the common defense. Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to keep them, with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.

It is said by the Attorney General that the Legislature may prohibit the use of arms common in warfare, but not the use of them in warfare; but the idea of the Constitution is, the keeping and use of such arms as are useful either in warfare, or in preparing the citizen for their use in warfare, by training him as a citizen, to their use in times of peace. In reference to the second [183] article of the Amendments to the Constitution of the United States, Mr. Story says, vol. 2, s. 1897: "The importance of this article will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defense of a free country against sudden foreign

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invasion, domestic insurrection and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up a large military establishment and standing armies in times of peace, both from the enormous expense with which they are attended, and the facile means which they afford to ambitious rulers to subvert the government, or trample upon the rights of the people. The right of the citizen to keep and bear arms, has justly been considered as the palladium of the liberties of the republic, since it offers a strong moral check against usurpation and arbitrary power of rulers; and will in general, even if these are successful in the first instance, enable the people to resist and triumph over them."

We cite this passage as throwing light upon what was intended to be guaranteed to the people of the States, against the power of the Federal Legislature, and at the same time, as showing clearly what is the meaning of our own Constitution on this subject, as it is evident the State Constitution was intended to guard the same right, and with the same ends in view. So that, the meaning of the one, will give us an understanding of the purpose of the other.

The passage from Story, shows clearly that this right was intended, as we have maintained in this opinion, and was guaranteed to, and to be exercised and enjoyed [184] by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.

Mr. Story adds, in this section: "Yet though this truth would seem to be so clear, (the importance of a militia,) it can not be disguised that among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How is it practicable," he asks, "to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust.

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and disgust to contempt, and thus gradually undermine all the protection intended by this clause of our national bill of rights."

We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, "a well regulated militia," though the clause still remains in our Constitutions, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived.

As we understand the able opinion of Judge Green, in the case of *Aymette v. State*, 2 Hum., 158, he holds the same general views on this question, which are to be found in this opinion. He says: "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 civilized warfare, and constitute the ordinary military equipment. If the citizens have these arms [185] in their hands, they are prepared in the best possible manner, to repel any encroachments upon their rights by those in authority."

He says, on p. 159: "The Legislature, therefore, have a 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, or would not contribute to the common defense." And we add, that this right to keep arms, though one secured by the Constitution, with such incidents as we have indicated in this opinion, yet it is no more above regulation for the general good than any other right. The right to hold property is secured by the Constitution, and no man can be deprived of his property "but by the judgment of his peers, or the law of the land." If the citizen is possessed of a horse, under the Constitution it is protected and his right guaranteed, but he could not, by virtue of this guaranteed th

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tle, claim that he had the right to take his horse into a church to the disturbance of the people; nor into a public assemblage in the streets of a town or city, if the Legislature chose to prohibit the latter and make it a high misdemeanor.

The principle on which all right to regulate the use in public of these articles of property, is, that no man can so use his own as to violate the rights of others, or of the community of which he is a member.

So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish [186] him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

We may here refer to the cases of *Bliss v. Commonwealth*, 2 *Littell, Ky. R.*, 90; *State v. Reid*, *Alabama R.*, 612, and case of *Nunn v. State of Georgia*, 1 *Kelly Rep.*, 243, as containing much of interesting and able discussion of these questions; in the two last of which the general line of argument found in this opinion is maintained. The Kentucky opinion takes a different view, with which we can not agree. We have not followed precisely either of these cases, but have laid down our own views on the questions presented, aided, however, greatly by the reasoning of these enlightened courts.

We hold, then, that the Act of the Legislature in question, so far as it prohibits the citizen "either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol," is constitutional. As to the pistol

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designated as a revolver, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such, and therefore hold this to be a matter to be settled by evidence as to what character of weapon [187] is included in the designation "revolver." We know there is a pistol of that name which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the repeater is a soldier's weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand, consistently with the views herein expressed. It will be seen the statute forbids by its terms the carrying of the weapon publicly or privately, without regard to time or place, or circumstances, and in effect is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it. Under this statute, if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute.*

In a word, as we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them in the ordinary mode of using such arms and is inoperative.

If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or [188] abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety

*See Page v. State. Post 188, in note.

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of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained.*

The question as to whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defense, or in anticipation of an attack of a dangerous character upon his person, is one of some little difficulty.

The real question in such case, however, is not the right of self-defense, as seems to be supposed, (for that is conceded by our law to its fullest extent,) but the right to use weapons, or select weapons for such defense, which the law forbids him to keep or carry about his person. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the Legislature to prohibit the keeping of such weapons; for, if he may lawfully use them in self-defense, he may certainly provide them, and keep them, for such purpose; and thus the plea of right of self-defense will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention [189] of crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or willful desire to use a particular weapon in his particular self-defense. The law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully proscribed by this statute. The object being to banish these weapons from the community by an

*See Act of 1871, c. 90.

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absolute prohibition for the prevention of crime, no man's particular safety, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience to all laws passed for the general good, is not only the duty, but the highest interest of every man in the land.

The principle we have laid down is sustained by a well established rule of the law of nations in the conduct of war. While the general rule is, that one belligerent may do his enemy all the injury he can, and for such purpose may lawfully kill him, yet the use of poisoned weapons is forbidden by the law of nations, on the ground that higher ends are thereby subserved, and the rights of sovereign belligerent nations even should be made subordinate to these ends. Vattel Law of Nations, top p. 361. So while the right of self-defense is one at all times to be maintained, yet as to the means used to attain this end, they must be subordinated to the higher claims of the general good of the community.

We admit extreme cases may be put, where the rule may work harshly, but this is the result of all general rules; that they may work harshly sometimes in individual [190] cases. By our system, however, allowing the Attorney General to enter *nolle prosequi*, with the assent of the Court, there is but little danger of the law being enforced in any such cases to the detriment of any one; and if such case should occur, an application to Executive clemency may fairly be assumed as the remedy provided by the Constitution to meet all such exigencies.

In the case of *The State v. Andrews*, one of the cases now under investigation, it is stated in bill of exceptions, that "a plea of self-defense" was filed, demurred to, and demurrer overruled. We can not notice the action of the court on this question, as the plea is not set out so that we can see its allegations and judge of their merits.

It is proposed, however, to prove, "that there was a set of men in the neighborhood of defendant during the time he had carried his pistol, and before, seeking the life of defendant." This testimony was objected to, and objection sustained by the court. We can not see from this statement that the court erred, as the character of the weapon is nowhere shown; and it may have been such a weapon, as we have held above, to have been properly forbidden to be carried at all. If so, then it was no defense to the indictment.

The proof, however, showed that he had been in the habit of carrying a pistol since the war. In such a case, he could not claim that he was really in peril of life or limb or great bodily harm, so imminent as to present any element of self-defense in justification of his carrying his pistol.

The law of the land gave him ample protection, if he had chosen to seek its aid by authorizing, on proper application, [191] the arrest of the parties, and sureties to keep the peace, or confinement in prison, to prevent the threatened injury. No court can assume that the law, in such case, would be powerless to give the needed protection. And we hold, that it is not only the highest duty of all, to submit to the law, and seek its protection, thus doing reverence to its mandates, but that this involves no humiliation, nor element of cowardice. On the contrary, it marks the highest moral courage to do right, notwithstanding passion and pride may urge us to the contrary course. He who subordinates his pride and his passions to the high behests of social duty, has shown himself as possessing the highest attribute of a noble manhood, sacrifice of self and pride, for the public good, in obedience to law.

In this view of the case, the question of what circumstances will justify a party in carrying arms, such as the Constitution permits him to keep, in legitimate self-defense, is hardly fairly before us. We may say, that the

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clause of the Constitution authorizing the Legislature to regulate the wearing of arms with a view to prevent crime, could scarcely be construed to authorize the Legislature to prohibit such wearing, where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense. It might well be maintained they were not worn under such circumstances in order to crime, or that such purpose existed, or that the wearing under the circumstances indicated, of a weapon that might lawfully be kept, had any direct tendency to produce [192] crime. On the contrary, the purpose would be to prevent the commission of crime on the part of another.

If the party is protected in the keeping and use of such arms as we have indicated, only to be restrained by such regulations as may be enacted by the Legislature, with a view to prevent crime, it would seem that the use of such a weapon for defense of the person when in actual peril, the end being a lawful one, ought not, upon any sound principle, to subject a party to punishment. However, when the Legislature shall enact a law regulating the wearing of weapons constitutionally allowed to be kept and used, as held in this opinion, the question may be presented fairly, and can be decided.

There was a motion to quash the indictment in each one of these cases, which was overruled. The indictment in each case only charges that the parties carried a pistol, without specifying the character of the weapon, whether belt or pocket pistol, or revolver. This was too indefinite a charge on such a statute, however literally it might be construed. There should be such specifications in the indictment as will enable the court to see that the weapon forbidden by the statute has been worn, and to inform the defendant of the character of weapon for the carrying of which he is to be held to answer.

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For this error the cases will be reversed; the indictments quashed, and remanded to the Circuit Courts to be further proceeded in.

Nicholson C. J., and Deaderick, J., concurred in [193] the general views of the opinion. Sneed, J., dissented from so much of the opinion as questioned the right of the Legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the act of 1870.

Nelson, J., delivered the following opinion:

Concurring, as I do, in much of the reasoning of the majority of the Court, and believing that the object of the Legislature, in passing the act of 1870, was to promote the public peace, I am, nevertheless constrained by a sense of duty to observe, that, in my opinion, that statute is in violation of one of the most sacred rights known to the Constitution. Ever since the opinions were promulgated, it has been my deliberate conviction that the exposition of the Constitution by Judge Robert Whyte, in *Simpson v. The State*, 5 Yerg., 360, was much more correct than that of Judge Green in *Aymette v. The State*, 2 Hum., 155. The expression in the case last named, that the citizens do not need for the purpose of repelling encroachments upon their rights, "the use of those weapons which are usually employed in private broils, and are efficient only in the hands of the robber and assassin," is, in my view, an unwarrantable aspersion upon the conduct of many honorable men were well justified in using them in self-defense. Ibid, 158. The provision contained in the declaration of rights in the Constitution of 1834, that "that the free white men of this State have a right to keep and bear arms for their common defense," is not restricted to public defense, as held in *Aymette v. The State*, 2 Hum., 158. [194] Had such been the intention, the definite article "the" would have been employed, instead of the personal pro-

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noun "their," which is used in a personal sense, and was intended to convey the idea of a right belonging equally to more than one, general in its nature, and universally applicable to all the citizens. The word "bear" was not used alone in the military sense of carrying arms, but in the popular sense of wearing them in war or in peace. The word "arms," means "instruments or weapons of offense or defense," and is not restricted, by any means, to public warfare.

The declaration of rights, section 26, in the Constitution of 1870, omits the words "free white men," and contains an additional provision, which should be construed in connection with the previous decisions of this court, the conflict in which was well known to the framers of that instrument. After declaring "that the citizens of this State have a right to keep and to bear arms for their common defense," it is added: "But the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." The word "bear" was manifestly employed in the Constitution of 1870, to convey the idea of carrying arms either for public or private defense; otherwise, it was unnecessary to add the provision that the Legislature shall have power "to regulate the wearing of arms with the view to prevent crime." The habit, or custom, intended to be regulated, was not that of bearing arms fit only to be used in war, and which, from the publicity with which such arms are carried, needed but little, if any, regulation. It was well known to the Convention, that [185] a very large number of citizens had become accustomed, during the late civil war, to carry pistols and other weapons not ordinarily used in warfare, and had retained this habit after the close of the war, and that dangerous wounds, as well as frequent homicides, were the result of its universal prevalence; and the object of conferring express power to regulate the mode of wearing them, was not to destroy the right, but so to control it that the Leg-

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islatore, by declaring that such arms should be worn publicly and not secretly upon the person, might prevent those crimes which are often committed by armed men in taking the lives of their unarmed adversaries. To "regulate" does not mean to destroy, but "to adjust by rule," "to put in good order," to produce uniformity of motion or of action; and, under this provision, there can be no question that, while the Legislature has no power to prohibit the wearing of arms, it has the right to declare that, if worn upon the person, they shall be worn in a public manner. The act of 1870, instead of regulating, prohibits the wearing of arms, and is, therefore, in my opinion, unconstitutional and void.

In *Bliss v. Commonwealth*, 2 Lit., 90, the statute to prevent persons wearing concealed arms, was held unconstitutional, as infringing the right of the people to bear arms in defense of themselves and the State. See *Cooley Const. Lim.*, 350; *Cockram v. The State*, 24 Texas, 401. The words "in defense of themselves and the State," are equivalent to the words "for their common defense," and but for the power to regulate, ingrafted upon the Constitution of 1870, should be interpreted here as they [196] were in Kentucky: "The words 'rules and regulations,' in the Constitution of the United States, are usually employed in the Constitution in speaking of some particular specified power, which it means to confer on the government, and not, as we have seen, when granting general powers of legislation: as, to make rules for the government and regulation of the land and naval forces; to 'regulate' commerce; to establish a uniform rule of naturalization; to coin money and 'regulate' the value thereof. In all these, as in respect to the Territories, the words are used in a restricted sense." *Paschal's Anno. Const.*, 238; *Scott v. Sandford*, 19 How., 337; 2 *Story's Const.*, 3d ed., 196, 213.

Neither the old nor the new Constitution confers the right to keep, or to bear, or to wear arms, for the purpose

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of aggression. The right exists only for the purpose of defense; and this is a right which no constitutional provision or legislative enactment can destroy. The right to the enjoyment of life is one of the "inalienable rights" with which the Declaration of Independence declares that all men are endowed by their Creator. And one of the most classical and elegant of all legal commentators declared, in regard to the great right of self-defense, that the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself, or to those to whom he bears a near connection,) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of the law is by no means an adequate remedy for injuries accompanied with [197] force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man, immediately, to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society;" 3 Black. Com., 84, m. In accordance with this view, I hold that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, he may defend himself with any weapon whatever, whether seized in the heat of the conflict, or carried for the purpose of self-defense. He is not bound to humiliate or, perchance, to perjure himself, in the slow and often ineffectual process of "swearing the peace," or to encourage the onslaught of his adversary by an acknowledgment of timidity or cowardice. It is deeply to be regretted that any peaceful citizen should be placed in a condition making it necessary for him to carry arms for his own protection, and that a purpose, laudable and honorable in itself, is often perverted by

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"lewd fellows of the baser sort" to purposes of assassination or revenge. But some of the most important elements in nature, such, for example, as fire and water, may be so misused and perverted. Yet we do not prohibit or destroy their use. We endeavor only to regulate it.

In the purer and better days of the Republic, "a well-regulated militia was regarded as necessary to the security of a free state;" and it was declared in the first amendment to our National Constitution, that "the [198] right of the people to keep and to bear arms should not be infringed."

So, "by the Anglo-Saxon laws, or rather by one of the primary and indispensable conditions of political society, every freeholder, if not every freeman, was bound to defend his country against hostile invasion;" and by the statute of Winchester, 13 Edw. I., every man between the ages

NOTE. KNOXVILLE, Nov. 4, 1871.

THOMAS PAGE v. THE STATE.

CARRYING ARMS. Act of 1870 construed. It is not every removal of a pistol or other weapon from place to place, that constitutes a "carrying" within the meaning of the act of 1870, c. 13, which prohibits carrying arms. To constitute the offense, the weapons must be carried as "arms."

FROM KNOX.

Criminal Court, May Term, 1871. M. L. HALL, J., presiding.

PROSSER, for the plaintiff in error, insisted, that under the Constitution the citizen was protected in an unlimited right to carry all kinds of arms without reference to size or quality, and had the right to keep and to bear arms at all times; the Legislature having the right to say how he shall wear them, but not to prohibit. The act of 1870 takes from the citizen the right to familiarize himself with the use of the arms of the smaller class, and so infringes the Constitution.

Attorney General HENSKILL, for the State, insisted that carrying weapons carrying arms, means going armed. To carry, has many

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of 15 and 60 was to be assessed and sworn to keep armor according to the value of his lands and goods: for 15 pounds and upward in rent, or 40 marks in goods, a hauberk, an iron breast-plate, a sword, a knife and a horse; for smaller property, less extensive [199] arms. See Hallam's Cons. Hist., 311. These laws were subsequently repealed or modified in the interests of despotic power. And Mr. Tucker, in his notes to Blackstone, says that "whoever examines the forest and game laws in the British Code, will readily perceive that the right of keeping arms is taken away from the people of England." See 1 Sharsw.

senses; to carry a scar, to carry a tune; to carry a loan. The word is not happily selected; but the objection is not, that it does not bear the exact meaning the Legislature intended to convey, but that it has other meanings, tending to confuse. A man may carry a wheelbarrow load of pistols to a shop; may carry them for repair, as merchandise; may carry in bundles, or boxes, or baskets; may carry pistols hunting, or to a gallery or tree to practice. In none of these cases would he be carrying them in the sense of the law. The law so construed, does not infringe the right to keep arms, or practice with them, or bear them for the common defense. Where a law admits of a construction consistent with the Constitution, it must be so construed: *Bristoe v. Evans*, 2 Tenn., 341, 345; *Bank of State v. Cooper*, 2 Yer., 596, 623; *Townsend v. Shipp, Cooke*, 294, 301; *L. & N. Railroad Co. v. Davidson Co.*, 1 Sneed, 637, 671; *Fisher v. Dabbs*, 6 Yer., 119, 135.

"Common defense," in the Constitution, has one of two senses. It can not have both. It either means defense as a community, or the individual defense of each man commonly, or on ordinary occasions. Now we know that it was intended to embrace the idea of general defense; it can not, therefore, mean the other, unless it be used in a double sense, in two opposite and distinct senses. The bearing of arms, then, is only protected on the occasions and when used in a manner appropriate to the public defense, as a citizen soldier. To keep for that purpose, necessarily includes the right to keep at all times and under all circumstances; but to bear for that use, means to bear on such occasions, at such times, and in such manner, as may be appropriate to that end. Not to wear weapons. It must mean after the fashion of a soldier, not after the manner of a cut-throat.

NICHOLSON, C. J., delivered the opinion of the Court.

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Black., 143. A jealous concern for public liberty and personal security animated our patriotic ancestors to encourage the use of arms. It was once the policy, too, of our State Government to foster a martial spirit among the people, and to train them to the use of arms, not only for the purpose of [200] national defense, but also in cases of necessity, for the defense of their own persons. The tendency now appears to be the other way, and passive obedience and slavish submission to wrong and outrage would seem to be the growing spirit of the times. While "shooting matches" were once encouraged by the Legislature, as

Page was indicted for carrying a belt pistol, a pocket and revolver. Upon his trial, on the plea of not guilty, he was convicted, fined and sentenced to imprisonment. He has appealed to this Court. It appears from the evidence in the bill of exceptions, that Page was seen coming from his home along the big road, about a mile distant from his house, carrying in his hand, swinging by his side, a pistol called a revolver, about eight inches long, but that it was not such weapon as is used as a weapon of war. He was not on a journey, nor was he a public officer. No other instance of his carrying a pistol is proven. He approached prosecutor, presented the pistol and threatened to shoot him. Was this such a carrying of a weapon as is prohibited by the act of 1870, c. 13? Shankland, 95. The evidence fully establishes the fact, that the pistol carried by Page was not an arm for war purposes; and therefore, under the ruling of this Court in the case of Andrews v. The State, decided at Jackson, it was a weapon, the carrying of which the Legislature could constitutionally prohibit. But the question here is, what is the meaning intended by the Legislature to be conveyed by the word "carry?" It will be observed, that the prohibitory clause of the Constitution uses the words, "keep and bear arms," &c. The Legislature has avoided using this language, but has used a word, which, as connected with weapons, conveys the idea of "wearing weapons," or "going armed." When we use the expression, "he carries arms," we mean "he goes armed," or "he wears arms." This is manifestly the sense in which the word was used by the Legislature, and we know of no other single word which could more clearly convey the meaning intended to be conveyed, than the word "carry." In this sense, Page was not literally carrying a forbidden weapon, but he was "carrying" it, that is, "he was going armed," contrary to the true meaning of the statute.

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a proper method of accustoming the citizens to the use of arms, the timid course of existing legislation is to make the peace warrant the only potent weapon of defense, and to teach the people to "have peace" upon any terms, no matter how degrading.

[201] Begretting, as I do, that the nobler objects of bearing and wearing arms are too often and too horribly perverted, I can not approve legislation which seems to foster and encourage a craven spirit on the part of those who are disposed to obey the laws, and leaves them to the tender mercies of those who set all law at defiance.

I concur in the foregoing dissenting opinion.

Turney, J.

It will be observed, that the interpretation which we give to the word "carry," meets and carries out the manifest purposes of the Legislature, which was, not only to make criminal the habitual carrying or wearing of dirks, sword-canes, Spanish stiletos, belt or pocket pistols, or revolvers, but, also, to make criminal a single act of wearing or carrying one of these weapons, when it is so worn, or carried, with the intent of thus going armed.

But we are far from understanding the Legislature as intending to make every act of carrying one of these weapons criminal. Under the constitution, every man has a right to own and keep these weapons, nor is this right interfered with by the prohibition against "carrying" them, in the sense in which the Legislature uses the word. To constitute the carrying criminal, the intent with which it is carried must be that of going armed, or being armed, or wearing it for the purpose of being armed. In the case before us, the intent with which Page was carrying his pistol was fully developed. He was carrying it that he might be armed, as was shown by his threatened assault upon the prosecutor. It would probably be difficult to enumerate all the instances in which one of these weapons could be carried innocently, and without criminality. It is sufficient here to say, that, without the intent or purpose of being or going armed, the offense described in this statute can not be committed.

We think the facts proven, in the case before us, bring the plaintiff in error within the offense defined in the statute, and that his conviction was fully warranted by the evidence.

The judgment is affirmed.

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