THE

AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO THE YEAR 1869.

COMPILED AND ANNOTATED

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BLISS *v.* COMMONWEALTH.

[2 LITTELL, 90.]

THE RIGHT OF THE CITIZENS TO BEAR ARMS in defense of themselves and of the state cannot be taken away or impaired. An act to prevent the carrying of concealed weapons is unconstitutional and void.

INDICTMENT. The opinion states the case.

By COURT. 1. This was an indictment founded on the act of the legislature of this state, "to prevent persons in this commonwealth from wearing concealed arms." The act provides 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 traveling 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 presentment of a grand jury. The indictment, in the words of the act, charges Bliss with having worn concealed as a weapon a sword in a cane. Bliss was found guilty of the charge, and a fine of one hundred dollars assessed by the jury, and judgment was thereon rendered by the court. To reverse that judgment Bliss appealed to this court.

2. In argument the judgment was assailed by the counsel of Bliss exclusively on the ground of the act on which the indictment is founded, being in conflict with the twenty-third section of the tenth article of the constitution of this state. That section provides "that the right of the citizens to bear arms in defense of themselves and the state shall not be questioned." The provision contained in this section, perhaps, is as well calculated to secure to the citizens the right to bear arms in defense of themselves and the state as any that could have been adopted by the makers of the constitution. If the right be assailed, immaterial through what medium, whether by an act of the legislature, or in any other form, it is equally opposed to the comprehensive import of the section. The legislature is nowhere expressly mentioned in the section; but the language employed is general, without containing any expression restricting its import to any particular department of government; and in the twenty-eighth section of the same article of the constitution it is expressly declared "that everything in that article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws

contrary thereto, or contrary to the constitution, shall be void." It was not, however, contended by the attorney for the commonwealth that it would be competent for the legislature, by the enactment of any law, to prevent the citizens from bearing arms, either in defense of themselves or the state; but a distinction was taken between a law prohibiting the exercise of the right, and a law merely regulating the manner of exercising that right; and whilst the former was admitted to be incompatible with the constitution, it was insisted that the latter is not so, and under that distinction, and by assigning the act in question a place in the latter description of laws, its consistency with the constitution was attempted to be maintained.

3. That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defense of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons, concealed in the manner described in the act, they may, nevertheless, bear arms in any other admissible form. But to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the right to bear arms in defense of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution. If, therefore, the act in question imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms, or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious. And can there be entertained a reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint which the act in question most indisputably imports, by prohibiting the citizens wearing weapons in a manner which was lawful to wear them when the constitution was adopted. In truth, the right of the citizens to bear arms has been as directly assailed by the provisions of the act 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; and if the act be consistent with the constitution, it cannot be compatible 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 of concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise. We may possibly be told, that although 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 were reversed, and instead of being the first, that which was first had been the last; the argument to be consistent should, nevertheless, 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 be done, it is equally forbidden by the constitution.

4. Hence, we infer that the act upon which the indictment

against Bliss is founded, is in conflict with the constitution; and if so, the result is obvious; the result is what the constitution has declared it shall be, that the act is void. And, if to be incompatible with the constitution makes void the act, we must have been correct throughout the examination of this case in treating the question of compatibility as one proper to be decided by the court. For it is emphatically the duty of the court to decide what the law is; and how is the law to be decided unless it be known? And how can it be known without ascertaining, from a comparison with the constitution, whether there exist such an incompatibility between the acts of the legislature and the constitution as to make void the acts? A blind enforcement of every act of the legislature might relieve the court from the trouble and responsibility of deciding on the consistency of the legislative acts with the constitution; but the court would not be thereby released from its obligations to obey the mandates of the constitution, and maintain the paramount authority of that instrument; and these obligations must cease to be acknowledged, or the court become insensible to the impressions of moral sentiment, before the provisions of any act of the legislature, which in the opinion of the court conflict with the constitution, can be enforced.

Whether or not an act of the legislature conflicts with the constitution, is at all times a question of great delicacy, and deserves the most mature and deliberate consideration of the court. But, though a question of delicacy, yet as it is a judicial one the court would be unworthy its station, were it to shrink from deciding it, whenever, in the course of judicial examination a decision becomes material to the right in contest. The court should never, on slight implication or vague conjecture, pronounce the legislature to have transcended its authority in the enactment of law; but when a clear and strong conviction is entertained that an act of the legislature is incompatible with the constitution, there is no alternative for the court to pursue but to declare that conviction and pronounce the act inoperative and void. And such is the conviction entertained by a majority of the court (Judge Mills dissenting) in relation to the act in question.

The judgment must, consequently, be reversed.

THE RIGHT TO KEEP AND BEAR ARMS "is not a right granted by the constitution. Neither is it in manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed;

but this, as has been seen, means no more than that it shall not be infringed by congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called in *The City of New York* v. *Miln*, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the constitution of the United States:" *United States* v. *Cruikshank*, 92 U. S. 542, 553.

The examination of the constitutionality of acts regulating the keeping and bearing of weapons must, under the above construction of the second amendment to the constitution of the United States, be made with reference to the respective constitutions of those states in which the acts in question were passed. The section of the Kentucky constitution under which the decision in the principal case was made, read: "That the right of the citizens to bear arms in defense of themselves, and the state, shall not be questioned." In order to free the legislative power from the restrictions necessarily imposed by the construction adopted in *Bliss* v. *Commonwealth*, and to conform to the spirit of the constitutional privilege, the section was altered in the new constitution of that state, by the addition of the clause, "but the general assembly may pass laws to prevent persons from carrying concealed arms." Under this form, the courts have enforced acts prohibiting the carrying of concealed weapons: *Hopkins* v. *The Commonwealth*, 3 Bush, 481; and have placed such a literal construction upon the prohibitory statute as to pronounce guilty one who was simply carrying to the purchaser a pistol sold by another: *Cutsinger* v. *Commonwealth*, 7 Bush, 392.

The right of the state legislatures to regulate the carrying of arms by its citizens, and to punish the carrying of concealed weapons is now generally recognized: *Aymette* v. *The State*, 2 Humph. 154, 160; *Andrews* v. *State*, 3 Heisk. 165, 186; *Fife* v. *State*, 31 Ark. 455; *State* v. *Jumel*, 13 La. An. 399; *English* v. *State*, 35 Tex. 472; *Hill* v. *Georgia*, 53 Ga. 572; *Chatteaux* v. *State*, 52 Ala. 388; *Wright* v. *Commonwealth*, 77 Pa. St. 470; Cooley on Const. Lim., sec. 350, note.

FLOYD v. JOHNSON.

[2 LITTELL, 109.]

ADVERSE POSSESSION for the statutory time bars relief in equity.

JOINT TENANTS, in order to claim the benefit of the statute of limitations, must all have been under some disability at the time their right accrued.

JUDICIAL NOTICE OF LAPSE OF TIME.—If the record shows the ancestor to have died thirty-two years before the commencement of the suit, the court will take judicial notice that ten years have elapsed since his children attained their majority.

SUCCESSIVE DISABILITIES cannot be taken advantage of to prolong the statute.

A POWER TO TWO EXECUTORS to sell cannot be executed by one; and a power to sell for special purposes can be exercised for those purposes alone.