THE

AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

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CITY OF SALINA v. BLAKSLEY.

[72 Kan. 230, 83 Pac. 619.]

CONSTITUTIONAL LAW—Right to Bear Arms.—A constitutional provision that people have the right to bear arms for their defense and security applies only to the right to bear arms as a member of the state militia, or some other military organization provided by law, and does not prevent the enactment of a valid law prohibiting and punishing the carrying of arms or deadly weapons by private individuals. (p. 198.)

D. Ritchie, for the appellant.

R. A. Lovitt, for the appellee.

230 GREENE, J. James Blaksley was convicted in the police court of the city of Salina, a city of the second class, of carrying a revolving pistol within the city while under the influence of intoxicating liquor. He appealed to the district court, where he was again convicted, and this proceeding is prosecuted to reverse the judgment of the latter court. The question presented is the constitutionality of section 1003 of the General Statutes of 1901, which reads: "The council may prohibit and punish the carrying of firearms or other deadly weapons, concealed or otherwise, and may arrest and imprison, fine or set at work all vagrants and persons found in said city without visible means of support, or some legitimate business."

Section 4 of the Bill of Rights is as follows: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."

231 The contention is that this section of the Bill of Rights is a constitutional inhibition upon the power of the legislature to prohibit the individual from having and carrying arms, and that section 1003 of the General Statutes of 1901 is an attempt to deprive him of the right guaranteed by the Bill of Rights, and is, therefore, unconstitutional and void. The power of the legislature to prohibit or regulate the carrying of deadly weapons has been the subject of much dispute in the courts. The views expressed in the decisions are not uniform, and the reasonings of the different courts vary. It has, however, been generally held that the legislatures can

regulate the mode of carrying deadly weapons, provided they are not such as are ordinarily used in civilized warfare.

To this view there is a notable exception in the early case of Bliss v. Commonwealth, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, where it was held, under a constitutional provision similar to ours, that the act of the legislature prohibiting the carrying of concealed deadly weapons was void; that the right of the citizen to own and carry arms was protected by the constitution and could not be taken away or regulated. While this decision has frequently been referred to by the courts of other states, it has never been followed. The same principle was announced in Re Brickey, 8 Idaho, 597, 101 Am. St. Rep. 215, 70 Pac. 609, but no reference was made to Bliss v. Commonwealth, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, nor to any other authority in support of the decision.

In view of the disagreements in the reasonings of the different courts by which they reached conflicting conclusions, we prefer to treat the question as an original one. The provision in section 4 of the Bill of Rights that "the people have the right to bear arms for their defense and security" refers to the people as a collective body. It was the safety and security of society that were being considered when this provision was put into our constitution. It is followed immediately by the declaration that standing armies in time [232] of peace are dangerous to liberty and should not be tolerated, and that "the military shall be in strict subordination to the civil power." It deals exclusively with the military; individual rights are not considered in this section. The manner in which the people shall exercise this right of bearing arms for the defense and security of the people is found in article 8 of the constitution, which authorizes the organizing, equipping and disciplining of the militia, which shall be composed of "all able-bodied male citizens between the ages of twenty-one and forty-five years." The militia is essentially the people's army, and their defense and security in time of peace. There are no other provisions made for the military protection and security of the people in time of peace. In the absence of constitutional or legislative authority no person has the right to assume such duty.

In some of the states where it has been held, under similar provisions, that the citizen has the right preserved by the constitution to carry such arms as are ordinarily used in civilized

warfare, it is placed on the ground that it was intended that the people would thereby become accustomed to handling and using such arms, so that in case of an emergency they would be more or less prepared for the duties of a soldier. The weakness of this argument lies in the fact that in nearly every state in the Union there are provisions for organizing and drilling state militia in sufficient numbers to meet any such emergency.

That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal constitution, which says: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here also the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose 233 is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law.

Mr. Bishop, in section 793 of the third edition of his work on Statutory Crimes, treating of this provision, which is found in almost every state constitution, says: "In reason, the keeping and bearing of arms has reference only to war, and possibly also to insurrections wherein the forms of war are as far as practicable observed."

The case of Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606, strongly supports the position we have taken. In that case the defendant was convicted of being a member of an independent organization that was drilling and parading with guns. The guns, however, had been intentionally made so defective as to be incapable of being discharged. The prosecution was had under a statute which provided: "No body of men whatsoever, other than the regularly organized corps of the militia [and certain other designated organizations], shall associate themselves together at any time as a company or organization, for drill or parade with firearms, or maintain an armory in any city or town of this commonwealth."

On the trial the defendant invoked the provision of the Massachusetts Bill of Rights that "the people have a right to keep and bear arms for the common defense" in support of

his contention that he had the right to bear arms. The court said: "This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities or towns, unless authorized so to do by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades."

The defendant was not a member of an organized 234 militia, nor of any other military organization provided for by law, and was therefore not within the provision of the Bill of Rights and was not protected by its terms. The judgment is affirmed.

All the justices concurring.

CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS.

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I. Effect of United States Constitution.

The second amendment to the United States constitution provides that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," but this does not give the right to bear arms for a purpose declared unlawful or in an unlawful manner.

Such amendment means no more than that it shall not be "infringed" by Congress, and has no other effect than to restrict the powers of the national government: United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29 L. ed. 615; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31 L. ed. 80.

As was well said in State v. Smith, 11 La. Ann. 633, 66 Am. Dec. 208: "The state statute against carrying weapons does not contravene the second article of the amendments of the constitution of the United States. The arms there spoken of are such as are borne by people in war or at least carried openly. . . . . This [amendment] was never intended to prevent the individual states from adopting such measures of police as might be necessary, in order to protect the orderly and well-disposed citizens from the treacherous use of weapons not even designed for any purpose of public defense, and used most frequently by evil-disposed men who seek to take ad-

vantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke. There is, therefore, nothing in the constitution of the United States which requires of us a rigorous construction of the statute in question."

The second article of the amendments to the constitution of the United States securing to the people the right to keep and bear arms is a restriction upon the powers of the national government only, and not upon state legislation: Fife v. State, 31 Ark. 455, 25 Am. Rep. 556; State v. Shelby, 90 Mo. 302, 2 S. W. 468; English v. State, 35 Tex. 473, 14 Am. Rep. 374; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. In the case last cited the court, in speaking of the second article of the amendments of the United States constitution, said that "the keeping and bearing of arms, therefore, which, at the date of the amendment, was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles and muskets, arms to be used in defending the state and civil liberty, and not to pistols, bowie-knives, brass knuckles, billies and such other weapons as are usually employed in brawls, street fights, duels and affrays, and are only habitually carried by bullies, blackguards and desperadoes, to the terror of the community and the injury of the state": State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600.

II. Effect of State Constitutions.

a. Carrying Concealed Weapons.—The examination as to the constitutionality of state statutes relating to the keeping and bearing arms must, under the above construction of the second article of the amendments to the constitution of the United States, be made with reference to the respective constitutions of those states in which existing statutes were passed. The constitutions of the several states generally provide that every person shall have the right to keep and bear arms in the lawful defense of himself or the state. In some of them it is added that the legislature shall have the right to regulate the exercise of such right, while in others no limitation is added, and in either case the power of the state legislatures to make the carrying of concealed weapons a crime is now generally recognized and conceded by the great weight of authority: State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; Owen v. State, 31 Ala. 387; Davenport v. State, 112 Ala. 49, 20 South. 971; State v. Buzzard, 4 Ark. 18; Fife v. State, 31 Ark. 455, 25 Am. Rep. 556; Haile v. State, 38 Ark. 564, 42 Am. Rep. 3; Nunn v. State, 1 Ga. 243; Willis v. State, 105 Ga. 633, 32 S. E. 155; State v. Mitchell, 3 Blackf. 229; In re Brickey, 8 Idaho, 597,

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101 Am. St. Rep. 215, 70 Pac. 609; State v. Smith, 11 La. Ann. 633, 66 Am. Dec. 208; Wilson v. State, 81 Miss. 404, 33 South. 171; State v. Wilforth, 74 Mo. 528, 41 Am. Rep. 320; State v. Shelby, 90 Mo. 302, 2 S. W. 468; State v. Speller, 86 N. C. 697; State v. Hogan, 63 Ohio St. 202, 81 Am. St. Rep. 626, 58 N. E. 572, 52 L. R. A. 863; Walburn v. Territory, 9 Okla. 23, 59 Pac. 972; Wright v. Commonwealth, 77 Pa. 470; Aymette v. State, 2 Humph. 151; Andrews v. State, 3 Heisk. 165, 8 Am. Rep. 8; State v. Wilburn, 7 Baxt. 57, 32 Am. Rep. 551; English v. State, 35 Tex. 473, 14 Am. Rep. 370; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. In speaking of the constitutional right to keep and bear arms in the lawful defense of the state or of the person, the court, in Haile v. State, 38 Ark. 566, 42 Am. Rep. 3, said that "the constitutional provision sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression. It is not intended to afford citizens the means of prosecuting more successfully their private broils in a free government. It would be a perversion of its object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens upon the occasion of any real or imaginary wrong. The 'common defense' of the citizen does not require that. The consequent terror to timid citizens, with the counter violence which would be incited amongst the more fearless, would be worse than the evil intended to be remedied. . . . . The clause, upon this point, of the Tennessee bill of rights is similar to ours, except that it expressly reserves to the legislature the power, 'by law to regulate the wearing of arms, with a view to prevent crime.' We think this reservation a matter of superabundant caution, inserted to prevent a doubt, and that unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any muniments of the bill of rights. Only the legislature must take care that in regulating it does not destroy nor materially interfere with the objects of the constitutional provision. A Tennessee law passed under the constitution of 1871 prohibiting the carrying of any army weapon except openly and in the hand was held constitutional: State v. Wilburn, 7 Baxt. 57, 32 Am. Rep. 551"; State v. Speller, 86 N. C. 697. A statute prohibiting the carrying of concealed, dangerous and deadly weapons upon the person, and an exhibition of the same, is a reasonable regulation to which the citizen must yield, and is a valid exercise of the legislative power: State v. Shelby, 90 Mo. 302, 2 S. W. 468.

In Bliss v. Commonwealth, 2 Litt. 90, 13 Am. Dec. 251, it was decided that the right of the citizen to bear arms in defense of himself and of the state cannot be taken away or impaired, and that an act to prevent the carrying of concealed weapons was unconstitutional

and void. Since that decision, however, the constitution of Kentucky has been so amended as to give the legislature power to prevent persons from carrying concealed arms: Hopkins v. Commonwealth, 3 Bush, 480; and one may be found guilty in that state of carrying a concealed deadly weapon though he is simply carrying to the purchaser a pistol sold by another: Cutsinger v. Commonwealth, 7 Bush, 392. And it has also been decided that a citizen may be guilty of a crime in carrying, within his own home, a deadly weapon concealed upon his person contrary to a statute prohibiting the carrying of concealed weapons: Wilson v. State, 81 Miss. 404, 33 South. 171.

b. **Carrying Deadly Weapons Openly.**—As to the constitutional right to keep and bear arms openly, there is much conflict in the few decided cases. In Fife v. State, 31 Ark. 455, 25 Am. Rep. 556, it was announced that a constitutional provision securing to the citizens of the state the right to keep and bear arms for their common defense relates to such arms as are used for the purposes of war, and does not prevent the legislature from prohibiting the wearing of such weapons as are not used in civilized warfare, and would not contribute to the common defense. And a statute which prohibits the carrying of any pistol whatever as a weapon refers to such pistols as are usually carried in the pocket, and of a size to be concealed about the person and used in private quarrels, and not such as are within the provisions of the constitution. "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 a citizen as a soldier, when called upon to make good the defense of a free people, and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus to use? Not everything that may be useful for offense or defense, but what may properly be included or understood under the title of 'arms' taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberty, as well as of the state.

"Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle of all descriptions, the shotgun, the musket and repeater are such arms, and that, under the constitution, the right to keep such arms cannot be infringed or forbidden by the legislature. Their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve

the general good so as not to infringe the right secured and the necessary incidents to exercise of such right'': Fife v. State, 31 Ark. 455, 25 Am. Rep. 556. The same principles are adopted and the same rule laid down in Andrews v. State, 3 Heisk. 165, 8 Am. Rep. 8, English v. State, 35 Tex. 473, 14 Am. Rep. 374, and State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600. Other cases maintain that a law which merely inhibits the wearing of certain weapons in a concealed manner is valid, but if it attempts to cut off the exercise of the right of the citizen to bear ''arms'' openly, or, under the color of prescribing the mode, renders the right itself useless, it is in conflict with the constitution and void: Nunn v. State, 1 Ga. 243; In re Brickey, 8 Idaho, 597, 101 Am. St. Rep. 215, 70 Pac. 609. It has been held, also, that a city ordinance prohibiting the carrying of a pistol either openly or concealed is repugnant to the constitution and void: State v. Rosenthal, 75 Vt. 295, 55 Atl. 610.

In Wilson v. State, 33 Ark. 557, 34 Am. Rep. 52, it was said that: ''But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey . . . . or when acting in the aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.''

A statute prohibiting a citizen from bearing arms, in this case an ordinary pocket pistol, openly, is, it has been held, in conflict with the constitution and void: Nunn v. State, 1 Ga. 243; Stockdale v. State, 32 Ga. 225.

c. Miscellaneous.—A state statute prohibiting all bodies of men other than the regularly organized volunteer militia of the state and the troops of the United States from associating together as military organizations, or drilling or parading with arms in any city of the state without license from the governor, is constitutional and valid: Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580, 29 L. ed. 615; Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606. A statute to this effect exists in California: Cal. Pen. Code, sec. 734.

It may be made a crime by statute to keep and bear arms of any kind in the presence of a court of justice: Hill v. State, 53 Ga. 472; and a statute which makes it a crime to keep and sell pistols except army or navy pistols is constitutional and valid: Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275; State v. Burgoyne, 7 Lea, 173, 40 Am. Rep. 60.