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The Right to Keep and Bear Arms for Private and Public Defence.

The second amendment of the constitution of the United States recites 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." Similar provisions will probably be found in the constitutions of most of the states. Thus the constitution of Texas declares that "every person shall have the right to keep and bear arms in the lawful defence of himself or the state, under such regulations as the (pg.260) legislature may prescribe." Art. 1, § 13. So the present constitution of Tennessee provides that "the citizens of this state have a right to keep and bear arms for their common defence; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." These and similar provisions in the constitutions of other states have been discussed in several cases, and with the apparently growing habit of legislatures to restrict the wearing of arms, their exposition assumes increasing importance. The provision in the federal constitution does not appear ever to have received exposition in the Supreme Court of the United States, but the state tribunals have furnished a series of interesting decisions upon the subject, referring either to the federal or to the state constitution.

1. The first of these appears to have been Bliss v. Commonwealth, 2 Littell, 90, determined in the Court of Appeals of Kentucky in 1822, and relates to the question we shall consider first—the *manner* of carrying weapons. The constitution of Kentucky provided "that the right of the citizens to bear arms in defence of themselves and the state *shall not be questioned*." It was held that a statute providing that "any person in this commonwealth, who shall hereafter wear a pocket-pistol, dirk, large knife, or sword in a cane, *concealed as a weapon*, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars," etc. This statute was held to be in conflict with the constitutional guaranty, and hence void—one of the three judges dissenting. The court said : "That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence 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 defence 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 upon 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 the court further on declare that "in principle there is no difference between a law prohibiting the wearing of *concealed* arms and a law forbidding the wearing of such as are exposed." And, therefore, the defendant having been convicted and fined for carrying a sword concealed in a cane, the judgment was reversed.

The next case in order of time appears to have been The State v. Mitchell, 3 Blackf. 229, determined in the Supreme Court of Indiana in 1833. The ruling is diametrically opposed to that in

the Kentucky case. The report does no more than mention the point ruled in the briefest terms, but it would seem that the Indiana constitutional provision was simply "that the people have a right to bear arms for the defence of themselves and the state." And the statute (Laws of Ind., ed. of 1831, p. 192) which was held not in derogation of this provision provided that "every person, not being a traveller, who shall wear or carry any dirk, pistol, sword in a cane, or other dangerous weapon *concealed*, shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars."

This ruling was followed by the Supreme Court of Alabama in 1840, in The State v. Reid, 1 Ala. 612. The provision of the Alabama constitution was almost identical with that of Indiana. It provided that "every citizen has the right to bear arms in defence of himself and the state." And it was held that this provision was not infringed by a statute which provided that "if any person shall carry *concealed* about his person any species of fire-arms, or any bowie-knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or other concealed weapon, the person so offending shall, on conviction thereof, before any court having competent jurisdiction, pay a fine of not less than fifty nor more than five hundred dollars," etc. The statute was held not in conflict with the constitutional provision. And this ruling was reaffirmed in Owen v. The State, 31 Ala. 387. The Supreme Court of Alabama in the former case say: "The constitution, in declaring that 'every citizen has the right to bear arms in defence of himself and the state,' has neither expressly nor by implication denied the legislature the right to enact laws in regard to the *manner* in which arms shall be borne. The right guarantied to the citizen is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the state.' The terms in which this provision is phrased seem to us necessarily to leave with the legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals." And further on they say: "We do not desire to be understood as maintaining that in regulating the manner of bearing arms, the authority of the legislature has no other limit than that of its own discretion. A statute which, under pretence of *regulating*, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution." And the court also say: "Under the provision of our constitution, we incline to the opinion that the legislature cannot inhibit the citizen from bearing arms *openly*, because it authorizes him to bear them for the purpose of defending himself and the state, and it is only when carried openly that they can be effectively used for defence." 1 Ala. 616, 617, 619.

The distinction here taken in regard to the *manner* of carrying or wearing weapons, has been followed in several later cases. Thus in Nunn v. The State, 1 Kelly, 243, decided in 1846, the Supreme Court of Georgia held that a statute of that state, so far as it sought to suppress the practice of carrying certain weapons *secretly*, was valid, inasmuch as it did not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms; but that so (pg.261) much of it as prohibited the wearing of certain arms *openly*, was unconstitutional and void. To the same effect, see Stockdale v. The State, 32 Ga. 225, and the very thoroughly considered case of The State v. Buzzard, 4 Ark. 18. So it has been held in several cases in Louisiana, that a statute prohibiting the carrying of *concealed* weapons did not infringe the right of the people to keep and bear arms, but was simply a measure of police, prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society. The State v. Jumel, 13 La. An. 399; The State v. Smith, 11 La. An. 633; The State v. Chandler, 5 La. An. 489. The same conclusion was reached by

the Supreme Court of Tennessee in 1840 in Aymette v. The State, 2 Humph. 154, but upon somewhat different grounds, as we shall see further on; and is also supported by Andrews v. The State, 3 Heiskell (Tenn.) 165.

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2. A second branch of the question relates to the *kind* of weapon, the carrying of which is within the constitutional guaranty. By far the most instructive case on this branch of the question is Aymette v. State, 2 Humph. 154. The constitution of Tennessee in force at that time provided that "the free white men of this state shall have a right to keep and bear arms *for their common defence*." And the question considered by the court was whether this constitutional provision was violated by a statute which provided "that if any person shall wear any bowie-knife, or Arkansas tooth-pick, or other knife or weapon that shall in form, shape or size resemble a bowie-knife, or Arkansas tooth-pick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon conviction thereof, shall be find," etc. GREEN, J., in an able opinion traces the constitutional provision to its origin in the English Bill of Rights, Stat. 1 W. & M., ch. St. 2, ch. 2, cl. and then makes the following observations upon its policy and scope: "As the object for which the right to keep and bear arms is secured, is of a *general* and *public* nature, to be exercised by the people in a body for their *common* defence, so the *arms*, the right to keep which is secured, are those which are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution." It was accordingly held that the statute was not in derogation of the state constitution.

But by far the most elaborate discussion of the question will be found in Andrews v. The State, 3 Heiskell, 165, determined in the Supreme Court of Tennessee in 1871. The state was ably represented, and the synopsis of the argument of the attorney-general should not be overlooked. The court possessed the weight of being composed of six judges; but unfortunately they were by no means unanimous, either as to the result, or as to the reasoning by which the result was reached. The provision of the present constitution of Tennessee is that "the citizens of this state have a right to keep and bear arms *for their common defence*; but the legislature shall have power by law to regulate the *wearing* of arms with a view to prevent crime." Const. of Tenn., art. 1, § 26. The material provision of the statute whose validity was disputed was that "it shall not be lawful for any person to *publicly* or *privately* carry and dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver." Act of Tenn., June 11, 1870; 2 Tho. & S. Code, § 4756 *a*. It was held that this statute was not in derogation of the constitution of the state, except so far as it restrained the keeping of arms "in the ordinary mode known to the court." In this result four of the judges concurred. FREEMAN, J., delivered the opinion of the court, in which the question is discussed at great length. NICHOLSON, Ch. J., and DEADERICK, J., concurred in the general views expressed by him; but 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. On the other hand, NELSON, J., dissented with much force, holding that the act was in derogation of the constitutional right to

bear arms, and in derogation of the natural and inalienable right of self-defence. While it is difficult to say precisely what this long case does decide, it may be fairly said to be an affirmance of Aymette v. State, *supra*; and no doubt the following sentences represent the views of all of the four concurring judges, except SNEED, J., who goes further in support of the power of the legislature to regulate the wearing of arms: "What, then, is he [the citizen] protected in the right to keep and thus use? Not everything that may be useful for offence or defence; but what may (pg.274) properly be understood or included 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 defence 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 he trained, we would hold that the rifle of all descriptions, the shot-gun, the musket and repeater are such arms; and under the constitution, the right to *keep* such arms cannot be *infringed* or *forbidden* by the legislature. Their *use*, however, may be subordinated to such regulations and limitations as are or may be authorized by the laws 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." * * * "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 stilletto, belt or pocket pistol, is constitutional. As to the pistol 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 is included in the designation 'revolver.'" * * * * "We know there is a pistol of that name [revolver] which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the 'repeater' is a soldiers' 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. * * * 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."

We must not here overlook the early Tennessee case of Simpson v. The State, decided by the Supreme Court of Tennessee in 1833, and reported in 5 Yerger, 356. The only question in that case was the sufficiency of an indictment for an *affray* which charged that the defendant, "with force and arms, at, etc., being arrayed in a warlike manner, then and there, in a certain public street and highway situate, unlawfully, and to the great terror of divers good citizens of the state, then and there being, an affray did make," etc. It was held that this indictment did not sufficiently charge an affray. The court consisted of four judges, among them Judge GREEN, who delivered the opinion of the court in Aymette v. The State, *supra*, and also Judge CATRON, afterwards one of justices of the Supreme Court of the United States, who, two years before, had delivered the opinion of the court in the famous Grainger case (5 Yerg. 459) expounding the law of self-defence; and with these were associated Judges WHYTE and PECK. WHYTE, J., delivered the opinion of the court, PECK, J., dissenting. Two *reasons* were given for holding the indictment insufficient. The *first* was that in order to constitute an affray there must be, 1st, fighting; 2d, and between two or more persons, 3d, and in some public place so as to cause terror to the people. Now the indictment did not charge *fighting*, nor fighting *between two or more persons*. It was therefore held insufficient. It is difficult to conceive how there can be *fighting*, unless there be at least two persons, unless it be between a man and a beast; but we are stating accurately the reasoning of the court. The *second* reason, and the one with which we have to do, is embodied in the following language of Judge WHYTE: "But

suppose it to be assumed on any ground that our ancestors adopted and brought over with them this English statute [2 Edw. III.] or portion of the common law, our constitution [of 1796] has completely abrogated it. It says 'that the freemen of this state have a right to keep and to bear arms for their common defence.' (Art 11, § 29.) It is submitted that this clause of our constitution fully meets and opposes the passage or clause in Hawkins of 'a man's arming himself with dangerous and unusual weapons,' as being an independent ground of affray, so as of itself to constitute the offense cognizable by indictment. By this clause of the constitution an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived that it would be going much too far to impair by construction or abridgment a constitutional privilege which is so declared. Neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby. We must attribute to the framers of it the absence of such a view." In Aymette's case, *supra*, Judge GREEN characterized the above language as "only an incidental remark of the judge who delivered the opinion, and therefore entitled to no weight." To enable the reader to judge how far this declaration of law by Judge WHITE was necessary to the determination of the question in the case, it should be remarked that it is an *argument* put forth to obviate the force of the following language of Sergeant Hawkins: "But granting that no bare words in the judgment of law carry with them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." (Hawk. P. C. Book 1, ch. 28, § 4, Leach's ed.)

The latest case upon this branch of the subject appears to be English v. The State, 35 Tex. 473. The statute considered in that case (Act of 12 April, 1871, 2 Pasch. Dig. Laws, art. 6512) provides with certain exceptions that "any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offence or defence, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such grounds of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defence of the state, as a militia-man in actual service, or as a peace officer or policeman, shall be guilty of misdemeanor," etc. The second section provides that "any person charged under the first section of this act who may offer to prove by way of defence that he was in danger of an attack on his person, or unlawful (pg.275) interference with his property, shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the weapon so carried was borne openly and not concealed beneath his clothing; and if it shall appear that this danger had its origin in a difficulty first commenced by the accused, it shall not be considered a legal defence." Section 3 provides that the governor may, by proclamation, exempt the frontier counties from the operation of the act. The remaining sections contain provisions which it is not necessary to notice. It will be seen that this statute is much stronger than any which we have previously cited. With certain restricted exceptions, it effectually prohibits the bearing of all small arms, whether openly or concealed, on horseback or on foot. It is doubtful whether so sweeping a statute can be sustained in the light of any of the adjudications already quoted. But the late Supreme Court of Texas nevertheless did, in English v. The State, *supra*, declare that it is neither in conflict with the second amendment of the federal constitution, nor with the provision of the constitution of that state quoted at the beginning of this article. The court (WALKER,

J.) say: "The word 'arms,' in the connection we find it in the constitution of the United States, refers to the arms of a militia-man or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster-pistol and carbine; of the artillery, the field-piece, siege gun and mortar, with side-arms. The terms dirks, daggers, slung-shots, sword-canes, brass-knuckles and bowie-knives belong to no military vocabulary. Were a soldier on duty found with one of these things about his person he would be punished for an offence against discipline. The act referred to makes all necessary exceptions, and points out the place, the time and manner in which certain deadly weapons may be carried as a means of self-defence; and these exceptional cases, in our judgment, fully cover all the wants of society. There is no abridgment of the *personal* rights, such as may be regarded as inherent and inalienable to man, nor do we think his *political* rights are the least infringed by any part of this law." The court also understand the word "arms" in the Texas constitution as having the same import and meaning which it has in the second amendment of the federal constitution; and they hold that the legislature may *regulate* the right to bear arms without taking it away, and that this has been done by the act under consideration.

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3. A third question is, whether the natural right of self-defence will under any circumstances justify the carrying of a particular weapon, and in a particular manner, when such carrying is forbidden by statute. "In reason," says Mr. Bishop, "there may be circumstances in which the right of self-defence will justify the carrying of a concealed weapon for the purpose; and should such a case arise (and it must be an extreme one, out of the ordinary course of things, or it could not arise), doubtless this should be held to be an exception, engrafted by the common law upon the general terms of the statute." Bish. Stat. Crimes, § 789. This view would seem to be entirely consistent with reason, and unavoidable. When we reflect on the question of what is termed the right of self-defence, we shall see that it is a most comprehensive right; that it is one and the same thing with the right to "life, liberty and the pursuit of happiness," which our fathers asserted in the Declaration of Independence. It would seem to follow from what has been said upon the subject by various writers that while society may *regulate* this right of self-defence so as to promote the safety and good of its members, yet any law which should attempt to take it away, or materially abridge it, would be the grossest and most odious form of tyranny. Thus, Sir Michael Foster says: "The right of self-defence in these cases [cases of felonious attacks upon person, habitation, or property] is founded in the law of nature, and is not, *nor can be*, superseded by any law of society; for, before societies were formed, * * * the right of self-defence resided in individuals; it could not reside elsewhere; and since, in cases of necessity, individuals incorporated into society cannot resort for protection to the law of society, that law with great propriety and (pg.286) strict justice, considereth them as still in that instance under the protection of the law of nature." (Foster Crown Law, 273-4. See also 2 Rutherforth's Institutes, ch. 16; Grotius' *De Jure Belli et Pacis*, lib. 2 cap. 1; Gray v. Coombs, 7 J. J. Marshall, 478; Isaacs v. State, 25 Tex. 174; Com. v. Riley, Thacher's Crim. Cas. 471; United States v. Holmes, 1 Wallace, Jr. 1.) It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious that it would be contrary to all our notions of right and justice to punish the carrying of arms, although it may have infringed the letter of some statute. To do so would be to make the law what it never was intended to be, an instrument of cruelty and injustice.

Such a case might clearly be said to fall within that class of cases in which the previously existing common law interpolates exceptions upon subsequently enacted statutes. See Bish. Stat. Crimes, §§ 7, 123, 131, 141, 351-359, 362, 789.

Turning to the adjudications, we find it declared in one case, under an Indiana statute, probably the same already cited (*ante*, 260), that if a person, not being a traveller, carry a concealed weapon, he is guilty of an indictable offense and his *motive* for carrying the weapon is immaterial. Walls v. The State, 7 Black. 572. A similar ruling was made in Cutsinger v. Commonwealth, 7 Bush. Ky. 392. But these cases do not help our enquiries, because the defendants did not claim to have carried the weapons for the purpose of defence against any threatened or impending injury, but, in one case, for the purpose of exhibiting it as a curiosity, and in the other, for the purpose of conveying it to another person.

In Hopkins v. Commonwealth, 3 Bush, Ky. 480, there was sufficient proof that the defendant, on a certain day, carried a pistol concealed about his person, and the defendant attempted to excuse the act by proving that he had been shot at by strangers more than two years before, and that "for precautionary security of self-defence" against a like attack he had carried a pistol ever since. The court (ROBERTSON, J.) said: "These facts were wholly *irrelevant*, as there was neither proof nor cause for apprehension of any such impending danger; and, therefore, there was no error in refusing to admit another witness to the same facts."

Another ground of error urged in the same case, was that the court should not have given the following instruction: "If the jury believe from the evidence that the defendant * * * carried a pistol concealed about his person, and that he had no *reasonable ground* to believe, and did not believe, that his person was in danger of great bodily harm, they should punish him by a fine," etc. To understand the force of this instruction, it should be observed that the Kentucky statute against carrying concealed weapons, in force at that time, made the carrying of such weapons lawful "where the person has *reasonable grounds* to believe that his person, or the person of some of his family, or his property, is in danger from violence or crime." 1 Stanton's Code, p. 414. The defendant's counsel insisted that the defendant was rightfully the best judge of the necessity or prudence of carrying a concealed pistol for self-defence, and was the only person who could know whether he in fact apprehended danger; and hence objected to so much of the instruction as required *reasonable grounds* for apprehension. The court, however, did not see the instruction in this light. Judge ROBERTSON said: "Were this erroneous, the salutary law against the pestilent and alarmingly prevalent habit among all classes, and especially among young men and even boys, of wearing concealed arms, through false and cowardly pride, and through mock chivalry, might soon become practically a dead letter. A statute so beneficent, and so often and so easily evaded, should be vigilantly upheld and stringently enforced by the judiciary, for repressing a dishonorable and mischievous practice, which, licensed or unlicensed, leads almost daily to causeless homicides and disturbances, which would otherwise never be perpetrated; and to that end, the accused should always be required to prove that he carried a concealed weapon only for the purpose of defending himself or family or property against an impending attack, *reasonably apprehended*, and which, if attempted, would justify the use of some such means of defence. But the superfluous addition of the words, 'and did not believe that his person was in danger,' relieves the instruction from the counsel's criticism, and makes it more favorable to the appellant than he had a right to demand or expect." Although this ruling was necessary in view of the terms of the Kentucky statute, yet it is thought that it would be the same on general principles; for it is in strict analogy with that numerous class of cases which makes the fears of *a reasonable man*, and not the fears actually entertained, the test of

the justification of the degree of force and kind of weapon employed in one's defence. (Selfridge's case, 1 Self-Defence Cases, 1; Sullivan's case, ib. 65; Shorter's case, ib. 258; and many others.)

In one of the cases in Tennessee, already quoted, Andrews v. The State, 3 Heiskell, 165, 188, there are considerable *dicta* on the question 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-defence. While admitting the question to be one of "some little difficulty," the learned judge who delivered the opinion of the court says: "The real question in such case, however, is not the right of self-defence, 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 defence, which the law forbids him to keep or carry. 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-defence, he may certainly provide them and keep them for such purpose, and thus the plea of right of self-defence 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-defence in its broadest sense, still, on sound principles, 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 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 wilful desire, to use a particular weapon in his particular self-defence. The law allows ample means of self-defence without the means which we have held may be rightfully (pg.287) proscribed by this statute, The object being to banish these weapons from the community by an 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. * * * We admit that 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 cases. By our system, however, allowing the attorney-general to enter a *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 presumed to be the remedy provided by the constitution to meet all such exigencies." The court, therefore, hold that the testimony tending to prove "that there was a set of men in the neighborhood of defendant during the time he carried his pistol and before, seeking the life of defendant," was properly rejected, *because it did not appear what the character of the weapon was*, and it may have been such a weapon as could not be properly carried at all, and if so, the testimony would be no defence to the indictment. Comparing the above with that part of this case which was quoted on page 274 of our last number, it is seen that it decides that a man may not, even in his necessary defence, carry, either publicly or privately, a *dirk, sword-cane, Spanish stiletto, belt or pocket-pistol*, but that he may carry such arms for his private defence as are adapted to the equipment of the soldier. Much as we respect the general views of the learned judge and the commendable desire to promote peace and public order which his opinion manifests, yet we do not think that either his reasoning or his conclusion on this particular branch of the question can be commended. It entirely confounds the right of arming one's self for private defence against a threatened danger, with the policy of the constitution of Tennessee, which guarantees the right of bearing certain arms in order to educate the citizen for military duty. If a citizen is obliged to perform a journey where he is in danger of being attacked by highwaymen, or by assassins who seek his life, he may, if he have the arms used by a militiaman, arm himself with

them;—we suppose he may even take a cannon along with him, if he have one. But if he have not, and cannot procure any of the weapons which are used in civilized warfare, he must go unarmed. Besides, in attempting to distinguish between the weapons which he may and may not use, the learned court descend into distinctions altogether too nice to be of any practical value. A belt or pocket-pistol may not be worn, but a "repeater" may. What is a large "repeater" but a belt-pistol, and what is a small "repeater" but a pocket-pistol? According to these distinctions, we suppose if the citizen have no other arms than an old-fashioned "pepper-box," he must needs leave it at home—to carry it to defend himself against the attack of a highwayman will be an indictable offence (and we don't know but it ought to be)—but he may lawfully carry a far more formidable and dangerous weapon—a cavalry-revolver, Colt or Remington. In short, before he may lawfully take with him any weapon for his personal defence, he must debate and settle in his mind whether such a weapon would be appropriate to the equipment of a soldier, and if it would, he may lawfully carry it for the purpose of defending himself; otherwise not. That such conclusions do not commend themselves to reason, need scarcely to be suggested. Nor do we perceive any ground for the distinction which the learned judge attempts to draw between the *right* of self-defence and the *means* by which that right may be secured. If the *means* are prohibited or withheld, can any one say that the right is of any substantial value? We think that upon this branch of the case the views of Judge NELSON, in his dissenting opinion, are much to be preferred. "I hold," said that learned judge, "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 conflict, or carried for the purpose of self-defence."

In the principal Alabama case which we have already quoted, The State v. Reid, 1 Ala. 612, 619, the question, it will be remembered, arose on a constitutional provision which guaranteed the right to bear arms "in defence of *himself* and the state." The court thought that in view of that provision it would not be competent for the legislature to prohibit the wearing of arms *openly*, because "it is only when worn openly that they can be efficiently used for defence." And they also say: "We will not undertake to say that if in any case it should appear to be indispensable to the right of defence that arms should be carried concealed about the person, the act 'to suppress the evil practice of carrying weapons secretly' should be so construed as to operate a prohibition in such case." The right to bear arms *when threatened with, or having good reason to apprehend an attack, or travelling or setting out on a journey*, was subsequently recognized in Alabama by statute. Ala. Code, 1852, § 3274; Owen v. State, 31 Ala. 388.

In Texas, as we have already seen (*ante*, p. 274), it has been held within the power of the legislature to prohibit the carrying of all *small arms*, notwithstanding a constitutional provision similar to that of Alabama, guaranteeing the right to carry arms for the defence of *one's self*, as well as for the defence of the state.

Such appears to be the unsatisfactory state of the authorities on this branch of the question. On the one hand, as long as the machinery which society has afforded for the *prevention* of private injuries remains in its present ineffective state, society cannot justly require the individual to surrender and lay aside the means of self-protection in seasons of personal danger; and it will be in vain that the laws of society denounce penalties against the citizen for arming himself when his life is menaced by the attacks of wild beasts, of highwaymen, or of dangerous and persevering enemies. On the other hand, the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons, and the utmost that the law can hope to do is to strike some sort of balance between these apparently conflicting rights.

[TO BE CONTINUED.](pg.295)
[CONCLUDED.]

4. We shall take leave of this subject by briefly considering whether the second amendment of the constitution of the United States is restrictive upon the states. This amendment 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." Mr. Bishop suggests that, "though most of the amendments are restrictions on the general government alone, this one seems to be of a nature to bind both the state and the national legislatures; and doubtless it does." Of the same view was the Supreme Court of Georgia in Nunn v. The State, 1 Kelly, 243, where the question was discussed at considerable length, and where a statute of that state was held in part invalid because in conflict with this amendment. In the three Louisiana cases already quoted, the subject was discussed solely with reference to this amendment to the federal constitution, and it seems to have been taken for granted that it is restrictive upon the states. State v. Chandler, 5 La. An. 489; State v. Smith, 11 La. An. 633; State v. Jumel, 13 La. An. 399. So in the Arkansas case, The State v. Buzzard, 4 Ark. 18, all the judges appear to have understood this amendment as applicable to the states; and Judge DICKINSON supposes it to pertain to the power possessed by the general government of organizing, arming and disciplining the militia. He says this provision of the federal constitution "is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."

This view of Judge DICKINSON contains the only plausible reason we have met with for supposing that this amendment is binding upon the states. The decisions of the Supreme Court of the United States, expounding the early amendments of the federal constitution, leave little room to doubt that none of the first ten amendments apply to the states, but that all of them are merely restrictive upon the federal power. Thus, in Barron v. The City of Baltimore, 7 Pet. 243, 247, it was held that an act of the Maryland legislature, which it was alleged deprived the plaintiff in error of his property without just compensation, was not void as being in conflict with the *fifth* amendment of the federal constitution. Chief Justice MARSHALL, delivering the unanimous judgment of the court, said: "The question presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States 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 framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The power they conferred on this government was 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 power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." This language would be equally decisive if applied to any of the first ten amendments. Again, in Fox v. The State of Ohio, 5 How. 410, 434, it is declared that the prohibitions contained in the amendments to the federal constitution "were not designed as limits upon the state governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states and of their citizens." "Such, indeed," said Mr. Justice DANIEL, in delivering the opinion of the court, "is the only rational and intelligible interpretation which these amendments can bear, since it is neither probable nor credible that the states should have anxiously insisted to engraft upon the federal constitution

restrictions upon their own authority—restrictions which some of the states regarded as the *sine qua non* of its adoption by them." So, also, it was held in Smith v. The State of Maryland, 18 How. 71, 76, that the provision of the *fourth* amendment of the federal constitution which prohibits the issuing of a warrant, "but upon probable cause, supported by oath or affirmation," had no application to the process of the state courts. Language equally decisive will be found in Withers v. Buckley, 20 How. 84, 90; Twichell v. The Commonwealth, 7 Wall. 321, and in other cases decided by the same court.(pg.296)

In view of these decisions of the only court whose interpretations of the federal constitution are binding and decisive, there would seem to remain no doubt that if the question should ever arise in that court it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states, and that every state has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether.